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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 823

PAN AMERICAN PETROLEUM CORPORATION, *Petitioner,*

vs.

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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No.

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vs.

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled case on January 12, 1962.

OPINIONS BELOW

The opinion of the United States District Court for the District of Nebraska is not reported. A transcript of the opinion is at R. 78-98, the findings of fact at R. 98-110, and the conclusions of law at R. 110-118. The opinion of the United States Court of Appeals for the Eighth Circuit (Appendix, *infra*, pp. 1a-18a) is reported at 297 F. 2d 561 (1962).

JURISDICTION

The judgment of the Court of Appeals was made and entered on January 12, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). Federal Jurisdiction in the court of first instance is based upon the diversity of citizenship of the parties.

QUESTIONS PRESENTED

Pursuant to Section 4 of the Natural Gas Act, rate schedules covering the sale of natural gas by Petitioner to Respondent were accepted for filing by the Federal Power Commission. Respondent did not protest or seek judicial review of such Commission actions. Years later, Respondent sued for alleged overpayments, claiming that lower contract prices applied. Petitioner as its defense contended that the higher rates filed, accepted, and made effective by the Commission by final action under Section 4 of the Act are the only legal rates and supersede any lower contract prices. The courts below concluded that such Commission actions do not establish a legal rate binding upon purchasers and sellers or upon a court in collateral litigation, and Respondent recovered judgment. The questions are:

> Where, pursuant to Sections 4(c) and 4(d) of the Natural Gas Act, the Federal Power Commission formally accepts rate schedules and changes of rates for filing and makes the rates provided therein effective:
>
> 1. Does the Commission thereby establish the effective, legal rate binding upon the purchaser, seller, and a court in collateral litigation?
>
> 2. If such Commission acts are not set aside by timely judicial review under Section 19 of the Act, do such acts establish the legal rate even if a

purchaser, in subsequent collateral litigation, asserts the rate accepted for filing is a unilateral rate?

STATUTES INVOLVED

The statutory provisions involved are Sections 4, 5, 16, 19, and 22 of the Natural Gas Act, 52 Stat. 822, 823, 831, and 833 (1938), 15 U.S.C. 717c, 717d, 717r, and 717u. (Appendix, *infra*, pp. 18a-25a.) Sections 154.91 through 154.94 of the Federal Power Commission's Regulations under the Natural Gas Act (18 C.F.R. 154.91-154.94) are also involved. (R. 40 *et seq.*)

STATEMENT

This case involves a basic question unresolved by this Court: What is the legal effect of the acts of the Federal Power Commission accepting rate schedules and changes of rates for filing under Sections 4(*c*) and (d) of the Natural Gas Act?[1] Interdependent issues arose as to whether such acts under the federal statute (a) provide a defense against subsequent claims for overpayments resting upon an alleged contract deriving force from state law; and (b) can be treated as void in collateral litigation between private parties, years later, if the rate accepted for filing was "unilateral".

Prior to December 2, 1953, Petitioner, (Pan American[2]) entered into three contracts for the sale of

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[1] The question was referred to, but not decided in *Pan American Petroleum Corporation* v. *Superior Court of the State of Delaware*, 366 U.S. 656 (1961). This Court said (p. 664): ". . . we are not called upon to decide the extent to which the Natural Gas Act reinforces or abrogates the private [unfiled refund] contract rights here in controversy."

[2] On February 1, 1957, the name of Petitioner was changed from Stanolind Oil and Gas Company to Pan American Petroleum Corporation.

natural gas to Respondent (Kansas-Nebraska) (R. 19) at prices less than 11¢ per Mcf (R. 49). On December 2, 1953, the Kansas Corporation Commission issued its order prescribing a minimum price of 11¢ per Mcf for gas withdrawn from the Kansas Hugoton Gas Field (R. 36), the source of the gas sold by Pan American to Kansas-Nebraska (R. 19).

On June 7, 1954, in *Phillips Petroleum Co.* v. *Wisconsin, et al.*, 347 U.S. 672, this Court upheld Commission jurisdiction over the rates involved. Thereafter, in *Cities Service Gas Co.* v. *State Corporation Commission of Kansas, et al.*, 355 U.S. 391 (1958), this Court held that the Commission jurisdiction to establish and modify these rates is exclusive.

On July 16, 1954, the Commission by Order No. 174 (18 C.F.R. § 154.91 *et seq.*) amended its Regulations under the Act, requiring Petitioner to file rate schedules with the Commission and thus to notify the public and the Commission of the June 7, 1954, rate for each of its sales, and also to provide for exercise by the Commission of its regulatory authority under the Act. Thereafter, Petitioner tendered its rate schedules to the Commission for filing pursuant to Section 4(e) of the Act. Each rate schedule involved in this case included a copy of the original contract with Kansas-Nebraska and a copy of the order of the State Corporation Commission of Kansas prescribing an 11¢ minimum price for the gas. Petitioner also tendered copies of invoices covering gas sold to Respondent on June 7, 1954, at a price 11¢ per Mcf (R. 45-48). Simultaneously, Petitioner advised Respondent in writing of the contents of the rate schedules which it was tendering to the Commission (R. 51).

These rate schedules were accepted for filing by the Commission at a regular meeting by formal vote, and its minutes show the rate of 11¢ per Mcf as the effective rate on June 7, 1954. (R. 53.) The Commission duly gave public notice of its decisions to accept such rate schedules by issuing letter orders (R. 54), by placing such letter orders in the Commission's public files, and by stamping the copies of the documents contained in the Commission's public rate schedules "Accepted", with numerical designation of each as one of Petitioner's rate schedules, and supplements thereto (R. 54). All of these Commission actions were taken in 1954 and 1955. Respondent was notified by Petitioner of Commission action on the rate schedules (R. 29).

Subsequently in 1957, Petitioner filed with the Commission under Section 4(d) of the Act and Section 154.94 of the Commission's Regulations (R. 41-42), a notice of a change of rate under each rate schedule, changing the rate from 11¢ to 11.055¢ (R. 61-64). Petitioner notified Respondent of such filings (R. 32). The Commission, in formal meeting, ordered that such changes of rates should become effective on July 1, 1957 (R. 70). Public notice of the Commission's decision to make such changes effective was duly given by placing letter orders (R. 68) in the Commission's public files and stamping the rate schedule supplements placed in Petitioner's public rate schedule files with the notation of July 1, 1957, as the "effective date" (R. 68-71.) In addition, Respondent was notified by Petitioner of the Commission's actions (R. 32).

Respondent did not at any time protest or otherwise complain of the filings made by Petitioner in 1954 and 1957. Respondent did not, under Section 19 of the Act, institute review of the regulatory actions and

decisions made by the Commission under Sections 4(c) and (d) of the Act.

On January 20, 1958, this Court in *Cities Service Gas Co.* v. *State Corporation Commission of Kansas, et al.*, 355 U.S. 391 (1958), held the Kansas 11¢ order invalid as an invasion of the jurisdiction of the Federal Power Commission. Thereafter Respondent brought this action on the theory that a letter dated February 18, 1954, which Respondent had earlier written to Petitioner, and notations upon Respondent's check vouchers constituted a contract to repay the difference between the amount paid under the filed rates and the amounts which would have been paid under the contract prices. Neither this February 18, 1954, letter nor the check vouchers have been accepted as a part of Petitioner's rate schedules or otherwise have been the subject of Commission regulatory action with respect to Petitioner's rates.

The case was tried on the pleadings and a written stipulation of facts setting forth in detail the Commission's regulatory actions under Sections 4(c) and 4(d) of the Act with respect to Petitioner's rate schedule and change of rate filings. (R. 18-78)

Respondent argued that Petitioner's rate schedule and change of rate filings were "unilateral" within the meaning of *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and that the regulatory action of the Commission under Sections 4(c) and (d) of the Act did not have the effect of establishing a rate that differs from the prices that were found to be in the contracts.

Petitioner contended that under the holding of *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951), and the rule of the *Mobile*

case, the Commission, by the final regulatory action taken by it under Sections 4(e) and 4(d) of the Act, had established the 11¢ and 11.055¢ rates as the only legally effective rates. Petitioner further contended that if the January 20, 1958, decision invalidating the 11¢ Kansas order in any way rendered Petitioner's earlier filings "unilateral", a court is bound by the Commission's outstanding regulatory actions and may not enter a common law judgment authorizing the sales on different terms.

The District Court held that the prices prescribed in the contracts, unaffected by the Commission's actions accepting and making effective the 11¢ and 11.055¢ rates, were at all times the legally effective rates (Conclusions 12, 16; R. 113-115) and rendered judgment against Petitioner for the refunds claimed to be due under the February 18, 1954, letter. The Court of Appeals affirmed (297 F. 2d 561; Appendix, *infra*, pp. 1a-18a) on the theory that the actions taken by the Commission under Sections 4(e) and 4(d) of the Act were of no legal effect because there had been no formal determination of reasonableness of the rates, after hearing, under Section 4(e) or 5(a) of the Act.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals Has Decided a Question of General Applicability to Commission Rate Regulation Under the Natural Gas Act and Which Has Not Been Decided by This Court.

Uncertainty today as to legal effect of Commission rate regulatory actions in this case—and in other pending cases[3] not involving state pricing orders—primarily

[3] E.g., *Socony Mobil Oil Co.* v. *Brooklyn Union Gas Co., et al.*, 5th Cir., No. 18941, decided February 14, 1962; *Hunt Oil Co.* v. *Federal Power Commission*, 5th Cir., No. 19,218, pending; *Shell Oil Co.* v. *Federal Power Commission*, 3rd Cir., No. 13,800, pending.

involves two decisions: that in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951), and that in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

Under the Natural Gas Act, effective rates are either (1) rates "accepted" for filing without suspension by Commission actions under Sections 4(e) and (d) (as here); or (2) rates suspended under Section 4(e), or thereafter "approved" as "just and reasonable" under that subsection; or (3) rates approved as reasonable after hearing under Section 5(a). Rates in the first category—"accepted" for filing—are, as a result of Commission action, the rates being charged today by gas producers in thousands of sales to interstate transmission pipelines.[4] This case thus involves the question of just what is the legal basis for all rates currently in effect by Commission action such as shown by the record here.

In *Montana-Dakota, supra,* this Court stated that by "accepting" rate schedules for filing under Section 205(e) of the Federal Power Act, 16 U.S.C. 824d(e), the Commission establishes the legally effective rate under that statute, and that the courts cannot authorize sales on other terms even if a court finds that documents in a rate schedule accepted by the Commission are void under state law. Although this Court divided on one issue in the case, there was no disagreement on

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[4] During fiscal year 1961 alone, of 1,532 rate increases filed with the Commission, 627 were accepted for filing under Section 4(d), without suspension. See Forty-first Annual Report of the Federal Power Commission to Congress (January 10, 1962), pp. 78-79. In the United States Government Proposed Executive Budget for Fiscal 1963, it is reported that as of January, 1961, natural gas was being sold under more than 12,000 independent producer rate schedules.

the point involved here. The majority opinion stated (p. 251):

> ". . . It [the buyer] can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms."

To the same effect is this statement in the dissenting opinion (P. 256):

> "Unless they are challenged, either by an interested party or on the Commission's initiative, the filed rates become the legal rates."

The Court further stated that persons of the opinion that the Commission erred in accepting rate schedules and establishing rates, should first bring their complaints before the Commission in the manner prescribed by the Federal Power Act.

Thereafter, in *Mobile*, the Court held that the Natural Gas Act does not abrogate the right of purchasers and sellers of gas to initially fix by contract the rates for sales of gas, and that Commission action accepting a "unilateral" rate for filing under Section 4(d) is reversible error. On the same day, in *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956), the Court held that the rule of the *Mobile* case also applies under Section 205(d) of the Federal Power Act.[5]

Both *Mobile* and *Sierra* had reached this Court through timely statutory review of Commission action.

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[5] Sections 205(c), 205(d), and 205(e) of the Federal Power Act are similar and comparable to Sections 4(c), 4(d), and 4(e) of the Natural Gas Act.

Montana-Dakota, like this case, arose from collateral litigation. There is now considerable uncertainty as to whether the *Mobile* and *Sierra* cases modified what is termed the "filed rate doctrine" of *Montana-Dakota*, or whether, after *Mobile*, that doctrine has any applicability at all under the Natural Gas Act. Such questions have arisen not only in collateral litigation as here, but also in direct review proceedings involving rates that now could be termed "unilateral" under *Mobile*, but which were never reviewed or set aside in the manner prescribed by Section 19(a) and (b) of the Natural Gas Act.[6]

In the instant case, Respondent contended that because of the *Mobile* decision, the rule of *Montana-Dakota* does not describe the legal effect of Commission "acceptance" of gas rate schedules, and that *Montana-Dakota* does not apply to common law actions respecting payment for gas sold under rate schedules with respect to which the Commission has not issued orders under Section 4(e) or 5(a) of the Act fixing a "just and reasonable" rate.

Petitioner argued that the rule of *Montana-Dakota* applies with full force to the effect that must be accorded Commission regulatory action under Sections 4(c) and 4(d); that *Mobile* is not in conflict with

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[6] *E.g.*, see *Portsmouth Gas Co.* v. *Federal Power Commission*, 247 F. 2d 90 (D.C. Cir. 1957); *Tyler Gas Service Co.* v. *Federal Power Commission*, 247 F. 2d 590, 593 (D.C. Cir. 1957). Similar uncertainty exists about the "filed rate doctrine" under the Motor Carrier Act. In *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464 (1959), the *Montana-Dakota* doctrine was cited as applicable to rate regulation under that Act, but compare *Hewitt-Robins, Inc.* v. *Eastern Freight-Ways, Inc.*, 293 F. 2d 205 (2d Cir. 1961), and Petition for Writ of Certiorari granted January 8, 1962, in No. 491, October Term, 1961.

Montana-Dakota, in that *Mobile* was a Section 19 review of Commission action; and that under *Montana-Dakota*, the District Court was without jurisdiction to enter judgment at common law retroactively prescribing the terms for the sale of gas that differ from the filed rates under rate schedules which have been accepted by the Commission.

Section 4(c) requires, *inter alia*, that:

> "... every natural gas company shall file ... schedules showing all rates and charges."

Section 4(d) relating to a change in rate schedule requires, *inter alia*, that:

> "... no change shall be made ... in any such rate ... or contract relating thereto, except after thirty days' notice to the Commission and to the Public. Such notice shall be given by filing with the Commission ... new schedules stating plainly the change or changes to be made ..."

The court below found these sections were complied with as to Petitioner's original Section 4(c) filing, stating:

> "... the FPC advised appellant that its rate filings 'have been accepted for filing' ..."
>
> (Appendix, *infra*, p. 4a)

As to Petitioner's change of rate filing under Section 4(d), the court states:

> "By letter dated August 19, 1957, the FPC notified the former (Pan American) of the acceptance of such new rate for filing."
>
> (Appendix, *infra*, p. 5a)

Having found that both Sections 4(c) and 4(d) as to original filing and as to change of rate had been fully complied with, the Eighth Circuit then holds that, because there had been no hearing under Section 4(e) to fix the "reasonableness" of the rate, Petitioner's rate filings and Commission action of "acceptance" under Sections 4(c) and 4(d) are without legal effect and that an alleged unfiled collateral contract controls. The Court thus states:

> "Inasmuch as there has been no hearing before the FPC to determine the lawfulness of the rates specified in the contracts between the parties, and no orders have been made by the FPC approving, rejecting or in any way affecting such rates, the 'integrity' of *the private arrangement between the parties*, as referred to by the Supreme Court in *Memphis, supra, remains unaffected.*" (Emphasis supplied).
>
> (Appendix, *infra*, p. 17a)

Contrary to *Montana-Dakota*, the court held that the rate "merely accepted by the Commission" fixes no "legal right," and then proceeded to "authorize commerce in the commodity on other terms." Cf. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951).

If the *Montana-Dakota* rule applies to Commission regulatory actions under Sections 4(c) and 4(d), as well as under Sections 4(e) and 5(a), the common law judgment affirmed by the Court of Appeals is invalid.

The effect of the decision below is obvious. Vast amounts of gas are purchased and sold each day under gas rate schedules and changes of rates with respect to which no orders under Section 4(e) or 5(a) of the Act fixing "reasonable" rates have yet been issued.[7]

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[7] *Supra*, footnote 4, p. 8.

The legally effective rate under such rate schedules is uncertain. The Eighth Circuit's conclusion is that any court having jurisdiction of a common law action between the parties may enforce an unfiled contract which effects a retroactive change in the rate made effective by the Commission. This means that the authority under which sellers have been and are receiving payment for this gas flows solely from private contracts arising out of right under state law, and not from Commission regulatory action arising out of the exercise of authority under the Natural Gas Act.

Petitioner interprets *Pan American Petroleum Corp.* v. *Superior Court of the State of Delaware*, 366 U.S. 656 (1961), to mean that this Court has not decided the substantial question of whether, in the light of *Mobile*, the rule of *Montana-Dakota* applies to Commission actions under Section 4(e) or 4(d) of the Natural Gas Act. Petitioner respectfully submits that the instant case brings this question clearly before the Court, and that as long as uncertainties exist with respect to the legal effect of Commission regulatory actions under Sections 4(e) and 4(d), not only are private parties wholly uncertain as to their rights, and source of those rights, but the Commission also is hampered in its efforts to bring independent producer rates effectively under the regulatory scheme provided for in the Act.

2. The Eighth Circuit's Construction of the Effect of Commission Acts Is in Conflict With Constructions of Other Circuits.

The Courts of Appeals for the Tenth and Third Circuits have construed Commission Acts of acceptance for filing under Sections 4(e) and (d) as establishing the legal rate binding on buyer and seller, unless and

until set aside on timely review under Section 19. In contrast, the Eighth Circuit holds such acts to be of no legal effect, and of no consequence in collateral litigation.

In *Cities Service Gas Co.* v. *Federal Power Commission*, 255 F. 2d 860 (1958), *cert. den., sub. nom., Magnolia Petroleum Co.* v. *Cities Service Gas Co.*, 358 U.S. 387, the Tenth Circuit passed upon legal effect and finality to determine necessity for review of such Commission actions. That court held (255 F. 2d at 863):

> "An order of an administrative body is reviewable when action taken in advance of hearings or adjudications result in the setting of legal consequences . . . To assert that petitioner's (the purchaser's) aggrievement lay with the invalid Kansas Corporation Commission order and not with the Power Commission's *acceptance* of Schedule 26 is but to play with words." (Emphasis supplied)

The court concluded that acceptance of an 11 cent rate schedule for filing was binding on the purchaser, and that, unless set aside under Section 19, the Commission acts would be conclusive in collateral litigation (255 F. 2d at 863-864).

Similarly, the Third Circuit held such Commission acceptance for filing is final action, conclusive as to rate unless set aside on review. (See *Natural Gas Pipeline Co. of America* v. *Federal Power Commission*, 253 F. 2d 3 (3rd Cir. 1958), *cert. den. sub nom. Dorchester Corp.* v. *Natural Gas Pipeline Co.*, 357 U.S. 927, and particularly the court's discussion of the third and last order there involved, dated January 27, 1956, at 253 F. 2d at 9). The same court, citing *Montana-Dakota*, has also held that as long as Commission ac-

tion of "acceptance" of a rate schedule for filing is outstanding; even if issued in conjunction with temporary authorization of a sale, the rate thereby accepted for filing is the only legal rate. See *Signal Oil and Gas Co.* v. *Federal Power Commission*, 238 F. 2d 771, 773, fn. 1 (3rd Cir. 1956).

The Eighth Circuit is also in conflict, at least in reasoning, with the Court of Appeals for the District of Columbia and Fifth Circuits. The latter courts, considering both *Mobile* and Sections 4(e) and (d) have held that the specific rate made effective by the Commission's initial acceptance for filing under Section 4(e) cannot be changed to another rate, *even if* provided for by a *contract*, unless and until the seller tenders and the Commission accepts for filing a change of rate under Section 4(d). See *Episcopal Theological Seminary, et al.* v. *Federal Power Commission*, 269 F. 2d 228 (D.C. Cir. 1959), *cert. den. sub nom., Pan American Petroleum Corp.* v. *Federal Power Commission*, 361 U.S. 895 (1959), and *Bel Oil Corp.* v. *Federal Power Commission*, 255 F. 2d 548 (5th Cir. 1958), *cert. den.*, 358 U.S. 804 (1958).[8] In contrast, the Eighth Circuit's construction of Commission action and Section 4(e) and (d) would mean that regardless of Commission action, contract prices control, moving up or down, retroactively and prospectively, solely on the basis of private agreements, filed or unfiled, between buyer and seller.

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[8] See also *Texaco, Inc.* v. *Federal Power Commission*, 290 F. 2d 149 (5th Cir. 1961), wherein the Fifth Circuit held that Commission action conditioning and initial rate at time of acceptance for filing and of issuance of temporary authorization, is a binding order as to rate, immediately reviewable under Section 19(b) (290 F. 2d at 152, 156-157).

Another aspect of this conflict in reasoning is illustrated by reference to this Court's opinion in *Atlantic Refining Co. et al.* v. *Public Service Comm'n., et al.*, 360 U.S. 378 (1959). There, this Court held that the Commission should condition initial rates tendered under Section 4, at the time of issuance of a certificate under Section 7, to protect the public interest *pending* determination of a "reasonable" rate under Section 4(e) or 5(a). This Court, as have lower courts other than the Eighth Circuit,[9] thus recognized that without such action at the time of filing, the initial rate filed under Section 4(e) would be the binding, legal rate, and so continue to be until after completion of such hearings under Sections 4(e) and 5(a). However, under the Eighth Circuit's interpretation, neither an initial rate accepted for filing under Section 4(e), *nor* the "conditioned" rate accepted under Section 4(d) *after* application of the *Atlantic (Catco)* principle, would be binding in collateral contract actions. Under the Eighth Circuit's holdings, either of these "accepted" rates could be ignored, and an original contract price would still control.

The Eighth Circuit has also erred by construing Commission orders to mean that the formal act of "acceptance" under Sections 4(e) or 4(d) has no legal significance.[10] If that were true, the Commission need

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[9] See, *e.g.*, *Texaco, Inc.* v. *Federal Power Commission*, 290 F. 2d 149 (5th Cir. 1961); *Public Service Commission of New York* v. *Federal Power Commission*, 287 F. 2d 146 (D.C. Cir. 1961).

[10] The Commission's letter orders of "acceptance" obviously have very specific meaning under the Act (R. 54). The Commission: *first* gives notice of "acceptance" for filing, *i.e.*, the rate is now on file under Sections 4(e) or (d) as an effective, legal rate; *second*, orders that *no* rate change may be made except through Section 4(d); *third*, advises that acceptance of a rate under

not pass on tenders under Section 4(c) or 4(d), as it does; issue letter orders, as it has since 1954, or give notice to the filing party and the public that, after its formal review, it has decided to "accept" a tender for filing. The Eighth Circuit thus treats the Commission as a mere depository of papers, with the legal rate to be determined only in collateral litigation between private parties.

Obviously, constructions by the Tenth and Third Circuits are correct, and the Eighth Circuit's holding is incompatible with an orderly administration of the Act, which provides a comprehensive, exclusive interrelation of Sections 4(c), (d), (e), and Section 5. Whether a dispute between private parties arises in the aftermath of a state order, as here, or from any other conflicting claims as to rights or prices under a contract, the Eighth Circuit cannot be correct in eliminating Commission jurisdiction under Sections 4(c) and (d) and in treating Commission acts thereunder as having no legal effect.

Under the doctrine of the *Montana-Dakota* case, the Federal Power Act provides comprehensive, effective rate regulation without collateral interference. If that

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Section 4 does not "waive" the separate requirements for a certificate under Section 7; *fourth*, advises "acceptance" is not "approval", *i.e.*, this effective, legal rate has yet to be determined "just and reasonable" under Sections 4(e) or 5(a); *fifth*, advises "acceptance" is not a recognition of any "claimed contractual right or obligation associated therewith", *i.e.*, the act of "acceptance" cannot be claimed as a "contract" running between filing party and the regulatory body, and the rate remains subject to statutory prohibitions upon changes, etc., regardless of contract claims; *sixth*, states "acceptance" is "without prejudice" to future orders, *i.e.*, as to "reasonableness" under Sections 4(e) and 5(a) or "public convenience and necessity" under Section 7.

doctrine similarly applies under the Natural Gas Act, natural gas rates are also subject to exclusive, effective control by the Commission; but if the court below is correct, the filed rate doctrine does not apply, and the Commission always shares its control of the rates under Sections 4(c) and (d) with courts of original jurisdiction.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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March, 1962.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 16,583

PAN AMERICAN PETROLEUM CORPORATION, *Appellant*,

vs.

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., *Appellee*.

Appeal from the United States District Court for the District of Nebraska

[January 12, 1962.]

Before VOGEL and BLACKMUN, Circuit Judges, and BECK, District Judge.

VOGEL, Circuit Judge.

This is an appeal from a judgment allowing appellee, Kansas-Nebraska Natural Gas Company, Inc., recovery of alleged overpayments for natural gas purchased from Pan American Petroleum Corporation, appellant.

Appellee is a Kansas corporation engaged in the purchase, production, transmission, distribution and sale of natural gas in the States of Kansas, Nebraska and Colorado. It concededly comes within the definition of a natural-gas company (15 U.S.C.A. § 717a (6)) in the Natural Gas Act, 15 U.S.C.A. §§ 717-717w, as amended, hereinafter referred to as the Act.

Appellant is a Delaware corporation engaged in the production and sale of natural gas in interstate commerce from wells in the Kansas Hugoton Field.

The amount in controversy exceeds $10,000, exclusive of interest and costs. (28 U.S.C.A. § 1332(a) as amended.)

The case, tried to the court upon the pleadings and a written stipulation of facts, involved sales of natural gas

from the Hugoton Field to appellee for transportation and resale by the latter in interstate commerce. These sales were made pursuant to three separate contracts dated October 8, 1949, March 28, 1950, and March 11, 1952, which provided for wellhead prices of 7¢ per MCF (thousand cubic feet), 7.5¢ per MCF and 10¢ per MCF respectively. The pressure base under each contract was 16.4 p.s.i.a. (pounds per square inch absolute). The contract of March 28, 1950, stipulated as being representative of all three contracts, provided for wellhead prices of gas for five years from date of first delivery at 7¢ per MCF at 16.4 p.s.i.a.; for the second five years at 8¢. Included also was the following provision:

> "If the Kansas Corporation Commission, the Federal Power Commission, or any other governmental agency, whether State or Federal, having competent jurisdiction, at any time during the term of this contract fixes or determines a higher price for gas in the Kansas Hugoton Field than is set forth in this Section 1, (a), (b) and (c), the Buyer shall pay Seller the price thus fixed or determined, provided, however, that the price to be paid by Buyer to Seller shall at no time during the contract period hereof be less than the price set out * * *."

Subsequently, the Kansas Corporation Commission, by order dated December 2, 1953, set a minimum price of 11¢ per MCF measured at a standard pressure base of 14.65 p.s.i.a. for natural gas at the wellhead from the Hugoton Field. In January, 1954, appellee and Cities Service Gas Company instituted review proceedings of this order in a Kansas state court. Appellee, however, to avoid expense and upon assurances that Cities Service would continue the suit, withdrew without prejudice from the review action. Before final decision of the Kansas Supreme Court in these review proceedings, appellee, by letter dated February 18,

1954, and speaking of the 11¢ order, notified appellant as follows:

> "During the period of appeal and pending final judicial determination of said Order, beginning January 1, 1954, Kansas-Nebraska Natural Gas Company, Inc. intends to pay for all gas purchased by it in the Kansas Hugoton Field in compliance with said Order. This compliance, however, is made to avoid any penalties or actions under the laws of Kansas for any violation, and all payments made to you in compliance with said Order, pending its final judicial determination will be paid to you under protest and as involuntary payments on our part, all without prejudice to our rights.
>
> Should the said order be modified or declared to be invalid either in whole or in part, any and all overpayments made to you by virtue thereof shall be due and owing Kansas-Nebraska Natural Gas Company, Inc. In event of any such overpayments, the amount shall be withheld from subsequent payments in the event you have not made full settlement of any overpayment."

The checks given by appellee and accepted by appellant for gas thereafter purchased referred to the above letter and noted that payment was being made subject to the terms thereof. On March 3, 1954, as a result of the 11¢ order, appellee applied for permission from the Kansas Corporation Commission to increase its rates for the sale of natural gas, which permission was granted. A similar application was subsequently made to, and granted by, the FPC effective as of January 1, 1955.

On June 7, 1954, *Phillips Petroleum Co.* v. *Wisconsin* was decided by the Supreme Court of the United States, 347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035. Thereby the jurisdiction of the FPC under the Act was, for the first time,

extended to include the regulation of sales of natural gas by independent producers, such as appellant, who resell in interstate commerce. Pursuant to this decision, the FPC on July 16, 1954, issued its order No. 174 requiring, *inter alia*, that: (1) All natural gas companies subject to the Act obtain a certificate of public convenience and necessity before engaging in any transportation or sale of natural gas; (2) under § 4 of the Act (15 U.S.C.A. § 717c) the filing of schedules show all rates and charges incident thereto; and (3) by regulation, no independent producer make any change in rates in effect on and after June 7, 1954, without first filing a change in rates pursuant to § 4 (d) of the Act (15 U.S.C.A. § 717c (d). The rules and regulations adopted by such order were made applicable on and after June 7, 1954, the date of the *Phillips* decision, supra.

In accordance with this order, appellant in November, 1954, tendered to the FPC its rate schedule of gas sold appellee under the October 8, 1949, March 29, 1950, and March 11, 1952, contracts; a copy of said contracts; a copy of the Kansas 11¢ order and a copy of the billing for gas sold appellee during May, 1954. Appellant simultaneously mailed appellee copies thereof, stating that they had been filed with the FPC in compliance with the latter's order No. 174-A.[1]

Thereafter by letter dated March 8, 1955, the FPC advised appellant that its rate filings "have been accepted for filing" and:

> "This *acceptance for filing shall not be construed as a waiver* of the requirements of Section 7 of the Natural Gas Act, as amended; *nor shall it be construed as constituting approval of any rate*, charge, classification, or any rule, regulation or practice affecting

[1] Order No. 174 was subsequently amended by Nos. 174-A and 174-B in matters not pertinent to this appeal.

such rate or service contained in the rate filing; *nor shall such acceptance be deemed as recognition of any claimed contractual right* or obligation associated therewith; and *such acceptance is without prejudice* to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against your company." (Emphasis supplied.)

The only information appellee had of the FPC's acceptance of appellant's rate filings was the latter's letter of May 10, 1955, with an enclosure of a copy of the FPC's letter of acceptance. Apparently this information was furnished appellee in conformity with a letter dated November 23, 1954, wherein appellee requested data as to the steps taken by appellant in compliance with Order No. 174-A.

In 1957 the State of Kansas enacted a 1% severance tax on natural gas to become effective July 1, 1957. In regard thereto, appellee informed appellant that pursuant to the original gas-purchase contracts it would share one-half of this tax burden, but that first, since such would constitute an increase in rate, appellant, under FPC regulations, was required to file such increased rate with the FPC before it would become effective.

In conformity with the applicable FPC regulations, appellant on June 28, 1957, by letter submitted an increased rate schedule of 11.055¢ which reflected appellee's share of said severance tax. This letter of transmittal contained a "Comparison of prices prior to and subsequent to such change in price (cents per MCF)", showing an 11¢ base price per MCF as of June 30, 1957, and as of July 1, 1957, a total price per MCF of 11.055¢. By letter to the appellant dated August 19, 1957, the FPC notified the former of the acceptance of such new rate for filing. The letter also contained a cautionary paragraph similar to the one contained in the letter of March 8, 1955, supra. Appellee

was notified of the FPC's action in this regard by appellant's letter of August 29, 1957.

The review proceedings instituted by appellee and Cities Service, spoken of earlier, resulted in a decision of the Kansas Supreme Court on December 8, 1956, sustaining the 11¢ order. *Cities Service Gas Co.* v. *State Corporation Commission of Kansas*, 180 Kan. 454, 304 P.2d 528. This decision was reversed by the Supreme Court of the United States. *Cities Service Gas Co.* v. *State Corporation Commission of Kansas*, 1958, 355 U.S. 391, 78 S.Ct. 381, 2 L.Ed. 2d 355. Thereafter, on April 11, 1959, the Kansas Supreme Court held that the result of the reversal in *Cities Service*, supra, was to render the Kansas 11¢ order void *ab initio*. *Cities Service Gas Co.* v. *State Corporation Commission of Kansas*, 184 Kan. 540, 337 P.2d 640, certiorari denied 361 U.S. 836, 80 S.Ct. 89, 4 L.Ed. 2d 77. The Kansas severance tax had earlier been held invalid by the Kansas Supreme Court. *State* v. *Kirchner*, 1958, 182 Kan. 622, 322 P.2d 759.

By letters dated January 23, 1958, and February 18, 1958, appellee, relying upon the judicially determined invalidity of the severance tax and Kansas 11¢ order, advised appellant and other sellers of gas from the Hugoton Field that future payments would be calculated on the basis of the contract rates effective January 7, 1954, and would not include reimbursement for any share of the severance tax; also, that pursuant to its letter of February 18, 1954, refunds for the excess payments involuntarily made under the invalid 11¢ order would be requested. Upon appellant's denial of appellee's claim for recovery of such alleged overpayments, this suit was commenced. No claim is being made for recovery of appellee's share of the Kansas severance tax. Appellant filed a counterclaim for recovery of the difference, plus interest, between the amounts paid to it after January 1, 1958, and the amounts it alleges should have been paid to it under the rate of 11.055¢.

It was stipulated that appellee took no action before the FPC in relation to any of the rate filings mentioned above, nor did it seek to stay the effectiveness of the Kansas 11¢ order except by its earlier participation in the action by Cities Service Gas Company.

The trial court handed down an oral decision from the bench, subsequently making formal Findings and Conclusions. It found, *inter alia*, that:

> "• • • the Kansas 11¢ Order was void *ab initio* and never had any legal validity because at the time the Order was issued and at all times thereafter the Federal Power Commission had, under the Natural Gas Act, the *exclusive* jurisdiction over such sales and the Kansas State Corporation Commission had no jurisdiction over such sales"

and

> "• • • there was no determination by the FPC that 11.055¢ was a reasonable rate or the legal rate • • • ."

In its Conclusions the court, after noting jurisdiction under 28 U.S.C.A. § 1332, observed:

> "The interpretation and enforcement of the contracts between the parties on file with the FPC and granting relief to Plaintiff [appellee] does not require this Court to determine the reasonableness of the rates on file with the FPC nor to determine what constitutes reasonable rates"

and

> "Plaintiff's action to recover the overpayments made under compulsion of the Kansas 11¢ Order does not constitute a collateral attack on any order or determination of the FPC and does not attack or challenge any rate schedules on file with the FPC. Plaintiff's

action merely requires the proper interpretation under the law of what constituted the legal rates under its contracts filed as rate schedules and the enforcement of such rate schedules as so properly interpreted."

The court, relying upon *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 1956, 350 U.S. 332, 76 S.Ct. 373, 100 L.Ed. 373, and *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Div.*, 1958, 358 U.S. 103, 79 S.Ct. 194, 3 L.Ed. 2d 153 held:

"• • • The legally effective rate under each rate schedule was the price which Defendant was entitled to receive and Plaintiff was obligated to pay on June 7, 1954, under the terms of each contract, and not the 11¢ per Mcf price that was actually being paid under compulsion of the Kansas 11¢ Order.

• • • • • • •

"The supplemental rate filings made by Defendant in July 1957 pursuant to Order No. 197 did not constitute 11.055¢ per Mcf as the legally valid rate under the three rate schedules. The supplemental filings merely authorized an increase in the contractual rates effective as of June 7, 1954, by permitting Plaintiff to pay and Defendant to receive, in addition to those rates, the amount of one-half of the Kansas state severance tax of 1%. Since Plaintiff was actually paying 11¢ per Mcf at that time under compulsion of the invalid Kansas 11¢ Order (pending ultimate judicial determination of the validity of that Order), the 1% severance tax was measured on the basis of 11¢ per Mcf, making the tax 0.110¢ per Mcf and making Plaintiff's share .055¢ per Mcf. In accepting such supplemental filings there was no determination by the FPC that 11.055¢ was a reasonable rate or the legal rate under the contracts filed as rate schedules."

In so holding, the court noted:

> "The instant contract[2] contains a specific rate or rates. By reason of an invalid order of the Kansas Commission, a higher rate has been collected. The order fixing the invalid rate was void from its beginning. To this Court, therefore, it would seem to be unjust to permit the defendant to retain the amounts thus unlawfully collected."

Accordingly, judgment was given for appellee for the full amount of the alleged overpayments, $20,831.82 plus interest and appellant's counterclaim was dismissed.

Appellant's assignments of error are concerned essentially with the alleged infringement by the trial court of the exclusive primary jurisdiction of the FPC. It points out initially that appellee's action can succeed only as an enforcement action under § 22 of the Act (15 U.S.C.A. § 717u).[3] In this regard appellant contends that while the court disclaimed making any collateral attack upon the filed rate with the FPC but, rather, stated the action to be one to enforce filed rate schedules (§ 22 supra), yet the court noted the derivation of its jurisdiction to be 28 U.S.C.A. § 1332 (diversity and amount).

Appellant contends that by the Commission accepting the tendered rates for filing which were based upon the Kansas 11¢ order and the severance tax, such rates became the "effective" or "legal" filed rates and could be

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[2] Apparently the court here has reference to the contract stipulated as being representative of all three contracts.

[3] § 22. "The District Courts of the United States • • • shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder. • • •"

changed only by FPC action under § 5 (a) of the Act (15 U.S.C.A. § 717d (a)).[4] From this they reason that the only way the action would be questioned would be by the review procedure provided by § 19 of the Act (15 U.S.C.A. § 717r as amended),[5] and that appellee, not having utilized such appeal procedure, is now precluded from questioning collaterally the FPC "orders" here involved on grounds that the latter are now *res judicata*. They further contend that the trial court, by "nullifying" the orders of the FPC accepting the 11¢ and 11.055¢ rates, has usurped the power of the Courts of Appeals under § 19 of the Act.

First, with reference to the question of jurisdiction, it is noted that the requirements of 28 U.S.C.A. § 1332 as to diversity of citizenship and amount involved are fully satisfied. Unless the provisions of the Natural Gas Act bar jurisdiction of the district court, the action has been properly brought and the court acquired and maintained jurisdiction of the parties and of the subject matter in suit. We think the answer is found in the recent case of the Supreme Court of the United States, *Pan American Petroleum Corp.* v. *Superior Court of Delaware*, 1961, 366 U.S. 656, 81 S.Ct. 1303, 6 L.Ed.2d 584. The sole issue there was whether the Delaware Superior Court could take jurisdiction of a case which was bottomed on circumstances identical with those involved herein. The Delaware Supreme Court has sustained its lower court's finding of jurisdiction, stating that the claims of Cities Service

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[4] § 5. This section provides in part: "Whenever the Commission, after a hearing had upon its own motion or upon complaint • • • shall find that any rate • • • is unjust • • • the Commission shall determine the just and reasonable rate • • • and shall fix same by order • • •."

[5] § 19. This section provides for review of a Commission order, after rehearing by the Commission, in a United States Court of Appeals.

"* * * are not founded upon any liability *created* by the Natural Gas Act, but upon a private contract deriving its force from state law." (Emphasis in the original.) *Columbian Fuel Corp.* v. *Superior Court of Delaware*, 1960, . . . Del. . . . , 158 A.2d 478, 482. In affirming the Delaware court, Mr. Justice Frankfurter said, at page 663 of 366 U.S.:

> "The rights as asserted by Cities Service are traditional common-law claims. They do not lose their character because it is common knowledge that there exists a scheme of federal regulation of interstate transmission of natural gas."

At page 664 of 366 U.S.:

> "* * * We are not called upon to decide the extent to which the Natural Gas Act reinforces or abrogates the private contract rights here in controversy. The fact that Cities Service sues in contract or quasi-contract, not the ultimate validity of its arguments, is decisive."

We conclude here that the District Court had jurisdiction of the controversy under 28 U.S.C.A. § 1332.

Appellant next refers to §§ 4 and 5 of the Act (15 U.S.C.A. §§ 717c and d) as giving specific authority to the FPC with respect to rates and argues that the action of the District Court was an invasion of the FPC's "exclusive and primary jurisdiction". In *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, supra, 1956, 350 U.S. 332, 341, 76 S.Ct. 373, 100 L.Ed. 373, the Supreme Court said:

> "* * * These sections [§§ 4 and 5 of the Act] are simply parts of a single satutory scheme under which all rates are established initially by the natural gas companies, by contract or otherwise, and all rates are subject to being modified by the Commission upon a

finding that they are unlawful. The Act merely defines the review powers of the Commission and imposes such duties on natural gas companies as are necessary to effectuate those powers; it purports neither to grant nor to define the initial rate-setting powers of natural gas companies.

The powers of the Commission are defined by §§ 4 (e) and 5 (a). The basic power of the Commission is that given it by § 5 (a) to set aside and modify any rate or contract which it determines, after hearing, to be 'unjust, unreasonable, unduly discriminatory, or preferential.' This is neither a 'rate-making' nor a 'rate-changing' procedure. It is simply the power to review rates and contracts made in the first instance by natural gas companies and, if they are determined to be unlawful, to remedy them. * * * The scope and purpose of the Commission's review remain the same—to determine whether the rate fixed by the natural gas company is lawful."

At page 343 of 350 U.S.:

"* * * The initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act."

In the instant case, the jurisdiction of the FPC to determine the lawfulness of the rates involved has not been brought to bear. There has been no request for a hearing before the FPC, either on its own motion or on the motion of anyone else, to have determined the lawfulness of the rates under the "just and reasonable" standard of § 4 (e) (15 U.S.C.A. § 717c (e)). The court here was not asked to adjudicate any violation of the Act or to enforce any liability created thereby under § 22 of the Act (15 U.S.C.A. § 717u), supra. Appellee's claims for refund because of alleged overpayment are not founded on any liability

created by the Act but arise solely out of the contracts between the parties, which they had a perfect right to make and which are binding upon them, unaffected by the Act unless there has been a finding on the part of the FPC that the rates were unlawful as being unjust and unreasonable. Such a finding by the FPC could only be made after a hearing initiated on its own motion or by that of interested parties.

Appellant nevertheless argues that by the FPC's acceptance of the tendered rates based partially on the Kansas 11¢ order and the 1% severance tax, these rates became "effective or legal" and effectively changed the contract rate between the parties. Answer to this contention is in the letter from the FPC dated March 8, 1955, and subsequent letters accepting rate filings by the appellant, wherein the FPC stated, "* * * acceptance for filing shall not be construed as a waiver * * *; nor shall it be construed as constituting approval of any rate, charge, classification, or any rule, regulation or practice affecting such rate or service contained in the rate filing; nor shall such acceptance be deemed as recognition of any claimed contractual right or obligation associated therewith; and such acceptance is without prejudice to any findings or orders which have been or may hereafter be made by the Commission * * *." No order was issued and no approval was given and no determination of any kind was made by the FPC.

It should also be remembered that the contracts between the parties specifically provided that if the Kansas Corporation Commission, the FPC, or any other governmental agency, whether state or federal, *having competent jurisdiction*, should determine a higher price for gas, such higher price would be paid. When the Kansas 11¢ order was made, the appellee took the position by letter that it would pay the increased rate but that if such order was subsequently declared invalid, such overpayments were to

be due appellee. Checks in payment of gas thereafter carried the notation that payment was being made subject to the terms of such letter.

When the Supreme Court of the United States in *Cities Service Gas Co.* v. *State Corporation Commission of Kansas*, 1958, 355 U.S. 391, 78 S.Ct. 381, 2 L.Ed.2d 355, held the Kansas 11¢ order unlawful and the Supreme Court of Kansas, in *Cities Service Gas Co.* v. *State Corporation Commission of Kansas*, 1959, 184 Kan. 540, 337 P.2d 640, certiorari denied 361 U.S. 836, 80 S.Ct. 89, 4 L.Ed.2d 77, held in accordance with such decision that the Kansas 11¢ order was void *ab initio*, the effect was that the order became a complete nullity. Being a nullity, it could not modify the contract rates between the parties. The effect could only have been to leave the parties where they were prior to the unlawful order—in other words, bound by the contract rates to which they had agreed in 1949, 1950 and 1952. A parallel of reasoning is applicable to the Kansas 1% severance tax subsequently held invalid by the Kansas Supreme Court, *State* v. *Kirchner*, supra.

In dealing with a similar problem involving an order of the Oklahoma Commission establishing a minimum rate, which order was found to be invalid, the Court of Appeals for the Third Circuit in *Natural Gas Pipeline Co. of America* v. *F. P. C.*, 1958, 253 F.2d 3, 7, certiorari denied *sub. nom. Dorchester Corp.* v. *Natural Gas Pipeline Co.*, 357 U.S. 927, 78 S.Ct. 1372, 2 L.Ed.2d 1370, said:

> "• • • When the United States Supreme Court found Oklahoma's action to have been unlawful and set the state commission order aside, there was no longer even the semblance of a valid law, or lawful order which could modify the contract rate. The contract rate, therefore, under the mandate of the Supreme Court must be held to have been the rate effective on June 7, 1954."

The Tenth Circuit, in *Cities Service Gas Co.* v. *F. P. C.*, 1958, 255 F.2d 860, certiorari denied *sub nom. Magnolia Petroleum Co.* v. *Cities Service Gas Co.*, 358 U.S. 837, 79 S.Ct. 61, 3 L.Ed.2d 73, in dealing with the same Kansas order with which we are here concerned, said:

> "• • • *The Act recognizes the rights of the parties to set rates by individual contract and abrogates none of the usual contract rights except for the reviewing powers granted the Commission upon hearing.* • • • (255 F.2d at 864.)
>
> • • • • • • • • •
>
> "• • • In the present case, as in the Mobile case, no hearing has been held to determine the propriety of the filed rate. *When the United States Supreme Court struck down the Kansas order, there was no longer a valid order which could modify the contract rate, and the contract rate was the rate effective on June 7, 1954.* See *Natural Gas Pipeline Co. of America* v. *Federal Power Commission*, supra." (255 F.2d 865.) (Emphasis supplied.)

Support for the proposition that the Natural Gas Act is not inconsistent with agreements between the parties for repayments in the event certain increases in rates are held void is found in *Natural Gas Pipeline Co. of America* v. *Harrington*, 5 Cir., 1957, 246 F.2d 915, certiorari denied 356 U.S. 957, 78 S.Ct. 992, 995, 2 L.Ed.2d 1065. Therein recovery was sustained for the difference between the contract rate and the price paid under order of the Oklahoma Corporation Commission, which order was subsequently held to be invalid, as was the Kansas 11¢ order here.

The Supreme Court, in holding that the Natural Gas Act does not give the right to gas companies to abrogate their contract obligations and increase at will their price of gas by filing new rate schedules, subject only to the

FPC's approval under § 4 (e) (15 U.S.C.A. § 717c (e)), stated in *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Div.*, supra 1958, 358 U.S. 103, 113-114:

> "• • • This concern [protection of the public from excessive rates as well as the financial stability of natural gas companies] was surely a proper one for Congress to take into account in framing its regulatory scheme for the natural gas industry, cf. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 603, and we think that it did so not only by preserving the 'integrity' of private contractual arrangements for the supply of natural gas, 350 U.S., at 344 (subject of course to any overriding authority of the Commission), but also by providing in § 4 for the earliest effectuation of contractually authorized or otherwise permissible rate changes consistent with appropriate Commission review."

Appellant has cited cases dealing with the Interstate Commerce Commission as authority for the proposition that "it would destroy the purpose of the Interstate Commerce Act to permit a court to reach behind the rate on file with the Commission and collaterally revise the rate properly on file with the Commission", stating that this doctrine has been followed without deviation and citing *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 1907, 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 553; *T.I.M.E., Inc.* v. *United States*, 1959, 359 U.S. 464, 79 S.Ct. 904, 3 L.Ed. 2d 952. The answer to that attempt to draw a parallel between the Interstate Commerce Act and the Natural Gas Act is found in *Mobile, supra*, at pages 338 and 339 of 350 U.S., where the Supreme Court said:

> "In construing the Act [the Natural Gas Act], we should bear in mind that it evinces no purpose to abrogate private rate contracts as such. To the contrary, by requiring contracts to be filed with the Com-

mission, the Act expressly recognizes that rates to particular customers may be set by individual contracts. *In this respect, the Act is in marked contrast to the Interstate Commerce Act, which in effect precludes private rate agreements by its requirement that the rates to all shippers be uniform*, a requirement which made unnecessary any provision for filing contracts. *See Armour Packing Co. v. United States*, 209 U.S. 56. The Commission in its brief recognizes this basic difference between the two Acts and notes the differing natures of the industries which gave rise to it. The vast number of retail transactions of railroads made policing of individual transactions administratively impossible; effective regulation could be accomplished only by requiring compliance with a single schedule of rates applicable to all shippers. On the other hand, only a relatively few wholesale transactions are regulated by the Natural Gas Act and these typically require substantial investment in capacity and facilities for the service of a particular distributor. Recognizing the need these circumstances create for individualized arrangements between natural gas companies and distributors, the Natural Gas Act permits the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public." (Emphasis supplied.)

Inasmuch as there has been no hearing before the FPC to determine the lawfulness of the rates specified in the contracts between the parties, and no orders have been made by the FPC approving, rejecting or in any way affecting such rates, the "integrity" of the private arrangements between the parties, as referred to by the Supreme Court in *Memphis*, supra, remains unaffected. The action of the District Court here has preserved that integrity.

Appellant's contention that the doctrine of *res judicata* is applicable cannot be maintained as the FPC issued no orders and made no determinations. Appellant's further claim that the trial court usurped the power of the Courts of Appeals under § 19 of the Act (15 U.S.C.A. § 717r as amended) is for the same reason without merit.

Affirmed.

Pertinent Excerpts from Natural Gas Act

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

Sec. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the

jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the

sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 15 U.S.C. § 717c].

FIXING RATE AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Com-

mission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motive, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas. [52 Stat. 823 (1938); 15 U.S.C. § 717d].

ADMINISTRATION POWERS OF COMMISSION; RULES, REGULATIONS, AND ORDERS

SEC. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which

they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours. [52 Stat. 830 (1938); 15 U.S.C. §717f].

REHEARING; COURT REVIEW OF ORDERS

SEC. 19. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set

aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part.

No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its

findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(c) The filing of an application for rehearing under subsection (a) of this section shall not unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. [52 Stat. 831 (1938); 15 U.S.C. § 717r].

JURISDICTION OF OFFENSES; ENCOURAGEMENT OF LIABILITIES AND DUTIES

Sec. 22. The District Courts of the United States, the District Court of the United States for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law, brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder. Any criminal proceeding shall be brought in the district wherein any chapter or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder may be brought in any such district or in the district wherein the defendant is an inhabitant, and process

in such cases may be served wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254 and 1291-1294 of Title 28. No costs shall be assessed against the Commission in any judicial proceeding by or against the Commission under this chapter. [52 Stat. 833 (1938); 15 U.S.C. § 717u].

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IN THE

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OCTOBER TERM, 1961

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v.

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE OF WESTERN NATURAL GAS COMPANY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Movant, Western Natural Gas Company, a Delaware Corporation, by its attorneys and pursuant to the provisions of Rule 42(3) of this Honorable Court, respectfully moves that it be granted leave to file the accompanying brief *amicus curiae* in this case. The consent of the Petitioner has been obtained. The consent of the Respondent was requested but refused.

As will appear below, the disposition made of the Petition for Writ of Certiorari herein and the disposition made of the case on its merits in the event the petition is granted will directly affect Movant in a similar case and will resolve a matter of national consequence.

Movant believes that while the basic issue in both Petitioner's and Movant's cases is the question of the Federal Power Commission's acceptance for filing of documents tendered to the Commission and the rate shown thereby, there are other factors present in Mo-

vant's case which bear on a correct determination of the issue and should be presented to the Court.

Movant also believes that while the petition herein clearly and correctly presents the basic issue involved, the broad impact of the lower court's decision on all segments of the natural gas industry and its destructive effect on the Federal Power Commission's efforts at regulation under the Natural Gas Act[1] should be more fully explained for a proper understanding by the Court of the importance of the case.

Like Petitioner, Movant at the time of this Court's decision in *Phillips Petroleum Company* v. *State of Wisconsin, et al.*, 347 U.S. 672 (1954) reh. denied 348 U.S. 851, was producing and selling natural gas from the Kansas Hugoton Field to an interstate pipeline company, in this instance Cities Service Gas Company (Cities Service). The then effective price being collected by Movant and paid by the pipeline was 11¢ per Mcf as required by the pricing order issued by the Kansas Corporation Commission on December 2, 1953. This order became effective January 1, 1954. Following this Court's decision in the *Phillips* case, *supra*, the Federal Power Commission issued its Series 174 Orders[2] requiring producers, (1) to file the documents and billing statements evidencing their prices effective June 7, 1954, and (2) forbidding any change in any such price without filing a proper change in rate with the Commission. In accordance with the requirements of such Commission orders, Movant filed as its rate for gas sold to Cities Service on and after June 7, 1954, and effective until changed by a proper filing, its

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[1] Act of June 21, 1938, 52 Stat. 821-833, 15 U.S.C. §§ 717-717w.

[2] Order No. 174, issued July 16, 1954 (13 FPC 1195) as amended and modified by Order No. 174A, issued August 6, 1954 (13 FPC 1255) and Order No. 174B, issued December 17, 1954 (13 FPC 1576).

basic gas sale contract with Cities Service providing for an 8¢ per Mcf price, together with a copy of the Kansas pricing order and the 11¢ billing statement made to it by Cities Service. Copies of this filing were delivered to Cities Service, which made no objection thereto. In due time the Commission met and by formal vote accepted the tendered documents for filing, designated the contract as Movant's Rate Schedule No. 17, the Kansas Price Order as Supplement No. 3 thereto and noted the 11¢ price thereby shown.

Movant's purchaser made no protest to the Commission of such action or of the rate thereby accepted for filing, and prosecuted no appeal therefrom. Instead, such purchaser paid in accordance therewith until the first settlement following the January 20, 1958 decision[3] of this Court declaring the Kansas pricing order void *ab initio* as invading the jurisdiction of the Federal Power Commission. Movant's purchaser then unilaterally and without seeking any authority from the Federal Power Commission commenced paying Movant 8¢ per Mcf as set forth in the basic contract between the parties rather than the 11¢ rate as shown in Movant's filings with the Federal Power Commission. Movant promptly sought relief from the Federal Power Commission by filing with it, in Docket No. G-14958, a complaint against Cities Service seeking a declaratory order determining the legal rate and requiring its observance. The purchaser resisted such action and despite repeated efforts by Movant no hearing by the Federal Power Commission has yet been held on such complaint.

While resisting Federal Power Commission action on Movant's said complaint, and without seeking action or approval of any kind from that Commission, Cities

[3] *Cities Service Gas Company v. State Corporation Commission of Kansas, et al.*, 355 U.S. 391 (1958).

Service brought a common law action against Movant in a Delaware state court[4] seeking restitution of the amounts paid to Movant in excess of the 8¢ contract rate. In deciding one phase of this case, the trial court in an opinion rendered May 24, 1960 declared in effect that the contract rate and not the rate as filed with the Federal Power Commission was the legal rate *ab initio*. Final judgment has not yet been entered in this action.

Meanwhile, when Cities Service ceased paying Movant on the basis of the 11¢ rate as filed, certain of Movant's royalty owners brought an action[5] against Movant and Cities Service in a Kansas state court seeking a declaratory order that the 11¢ rate continued to be effective until changed in accordance with the procedures provided by the Natural Gas Act, and that royalties should therefore be determined on the basis of the 11¢ rate and not on the basis of the 8¢ contract price. This action is still pending.

Also during this period the Commission instituted and conducted under Section 5 of the Natural Gas Act[6] an investigation into all of Movant's rates and charges. In hearings on this matter, the Commission's Staff in determining the reasonableness of Movant's revenues gave full recognition to the 11¢ rate as filed as the legal rate for Movant's sales to Cities Service. The Commission dismissed this proceeding against Movant without disturbing said 11¢ rate on January 29, 1960.[7]

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[4] *Cities Service Gas Company v. Western Natural Gas Company*, Civil Action No. 674, Superior Court in and for New Castle County, Delaware.

[5] *Shore v. Western Natural Gas Co. & Cities Service Gas Co.*, Case No. 2358, Dist. Ct. of Stanton County, Kansas; September, 1958.

[6] 15 U.S.C. § 717d.

[7] *Matter of Western Natural Gas Company*, 23 FPC 235.

The importance of the issue tendered to this Court by Petitioner in the case at bar is not confined to Petitioner and Movant. As is shown in the attached brief, during the five year period from 1957 to 1961, approximately 78% of the rate increases filed by independent producers, and approximately 19% of the rate increases filed by pipeline companies, were merely accepted for filing and were permitted to go into effect without any proceeding by the Commission to determine the justness and reasonableness of the rates proposed. All such rates thus filed and accepted are made suspect by the decision below, since in the view of that court neither the documents accepted for filing and the price evidenced thereby, nor the rate set forth in the Commission's order accepting the rate filing, establishes the legal rate. Instead, determination of such rate is left for later adjudication by the courts in actions at common law to determine and enforce the contractual obligations of the parties.

Movant respectfully submits that the foregoing not only demonstrates that the uncertainty, vexation, costly litigation and frustration which Movant has suffered in seeking certainty of its rights and liabilities will be perpetuated by the decision below; it also demonstrates that similar uncertainty, vexation, costly litigation and frustration will necessarily plague all segments of the natural gas industry subject to Federal regulation unless the question at issue is accepted for determination and put at rest by this Honorable Court.

WHEREFORE, Movant prays that this Court grant this motion and permit the filing herein of the attached brief in support of the granting of this Writ of Certiorari.

Respectfully submitted,

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v.

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BRIEF AMICUS CURIAE OF WESTERN NATURAL GAS COMPANY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

The interest of the Amicus in this case is set forth in the motion to which this brief is attached.

REASONS FOR GRANTING THE WRIT

1. The Decision Below is of Broad National Significance Because It Marks a Radical Departure From the Regulatory Scheme Contemplated by the Natural Gas Act and Renders Effective Regulation Impossible.

Contrary to traditional and established concepts of rate regulation under the Natural Gas Act,[1] the court below has held that the legal rate for the sale of natural gas in interstate commerce may be adjudicated by a

[1] Act of June 21, 1938, 52 Stat. 821-833; 15 U.S.C. §§ 717-717w.

court in private litigation between the buyer and the seller—litigation to which the Federal Power Commission is neither a necessary nor an invited party. Such is the rule announced and enforced below, notwithstanding the fact that all documents pertaining to the sale have been filed with, and accepted for filing by, the Federal Power Commission as the seller's FPC Gas Rate Schedule governing that sale.

Under this new and novel concept, neither the Commission's acceptance of documents filed as tariffs or rate schedules by the seller pursuant to the provisions of the Natural Gas Act and to Commission's series of Orders No. 174, nor the Commission's order evidencing that acceptance, operates to establish or to fix the legal rate. Instead, the court below would make controlling the contractual agreement between the seller and the buyer as subsequently construed in future litigation brought in any court having jurisdiction over the parties in a common law action for debt or restitution.

This result is reached through legal legerdemain by which the lower court has been persuaded to hold that a law, or a particular provision prescribing the rate at the time of Commission acceptance of the filing, never in fact existed since in subsequent unrelated litigation years later it is found invalid *ab initio*. Implicit in the Court's holding is the determination that the Commission's action in accepting the filing and permitting the given rate to become effective is without legal significance.

In the case at bar, a state order sufficiently vital and alive at the time of filing to be observed both by the buyer and seller is held to have vanished retroactively

by virtue of subsequent declaration of invalidity, and the recognition given it by the Commission at the time of its acceptance for filing is declared a nullity. By the same reasoning, tomorrow a provision written in a contract by the parties and accepted for filing as establishing a rate may be declared to have never existed for filing nor to have been subject to Commission acceptance because found void *ab initio* years later.

The Commission recently declared favored nations clauses contrary to sound rate policy and ordered them deleted from future filings.[2] Where so deleted by a producer in compliance with these orders, and upon the express condition that these orders are valid, would not the rate which would have been established thereby be held retroactively to have been, in fact, the true rate, should the Commission's orders be later held void *ab initio*?

In the case at bar the result is to determine the rate lower than as originally filed. But this path does not lead downward only; it can also lead upward. Had the seller treated the pricing order as void at the time of the rate filing and had it accordingly tendered only the 8¢ contract, would not a later determination declaring the pricing order to have been valid *ab initio* make the binding agreement—hence the effective rate from the beginning—that commanded by the pricing order and not that shown in the documents filed? And would not the producer then be allowed by suit against the buyer in any court otherwise having jurisdiction to recover judgment against the purchaser for the difference between the rate shown in the filing and the truly

[2] Orders Nos. 232-A and 242, 25 F.R. 2850, 27 F.R. 1356.

binding rate prescribed by the contract as modified by the pricing law?

The lower court cites also in support of its position the doctrine of the *Mobile*[3] case, declaring the producer's filing of the minimum price order and price prescribed thereby to have been a "unilateral" filing, hence beyond the jurisdiction of the Commission to accept. Even if we concede correctness of the unilateral character of the filing within the meaning of the *Mobile*, case *supra*, we believe a proper construction of the law requires giving validity to the rate *as filed*, since it was accepted for filing unconditionally by the Commission and no protest or appeal from the order accepting the filing was taken by any interested party as contemplated in the Act.[4] However, we do not concede that the filing of the pricing order here was in any sense a unilateral filing by the producer. "Unilateral", by dictionary definition means "one-sided; ex parte; having relation to only one of two or more persons or things" (Black's Law Dictionary, 4th Ed., 1951).

In the *Mobile*, case, a seller under a contract providing a fixed price acting under no compulsion of law but entirely upon its own volition and for its own purpose tendered for filing a higher rate, to which the purchaser had given no assent. The filing, being duly protested and appealed from as provided by the Act, was held unauthorized. In the instant case the filing alleged to be unilateral was a state pricing order which, at that time, was observed by both buyer and seller and was binding upon both until ultimately ad-

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[3] *United Gas Pipe Line Co.* v. *Mobile Gas Serv. Corp.*, 350 U.S. 332.

[4] *The Portsmouth Gas Co.* v. *F.P.C., et al.*, 247 F. 2d 901 (D.C. Cir., 1957).

judicated otherwise.[5] The seller in making the filing was thereby acting in compliance with injunctive requirements of the Federal Power Commission under its Order No. 174[6] requiring producers to file and exhibit the rates in effect on June 7, 1954 including effective billing statement, and enjoining any change therein without further filing with the Commission. Thus, the filing and the rate here attacked was not one tendered for filing by choice of the seller. It was one required by law to be observed by both seller and buyer, and one which the seller by express order of the Commission was required to make.

The price provision attacked here should be likened to a contract clause mutually agreed upon by buyer and seller providing a basis for determining a price which clause is later held void *ab initio* by a court of competent jurisdiction, as contrary to public policy or beyond the contractual capacity of the parties. Consisteney with the decision below would require holding that, even though such contract provision was agreed upon by the parties, was tendered and unconditionally accepted for filing by the Commission, and was not protested or appealed from by the purchaser, either party could by court proceeding years later obtain effective adjudication that the price and legal rate was not that as tendered and accepted, but was the contract rate as it stood after excision of the invalid provision. The regulatory chaos resulting from such a holding is obvious.

And the Federal Power Commission itself in an able and exhaustive brief *amicus curiae* filed in this Court

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[6] 18 C.F.R. § 154.91.

[5] Movant's observance was required under threat of criminal penalty and a question exists as to whether such criminal penalty applied also to the purchaser.

in *Montana-Dakota Utilities Co.*, v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951), "raises questions important to the administration of the Federal Power Act, and by close analogy the Natural Gas Act,"[7] demonstrated the necessity of according sanctity to rates as accepted for filing regardless of questions of their reasonableness or even fraud in the filing. Such brief showed that neither of these Acts either provided for or reserved a common law right to reparation, and that the legal process provided thereby afforded ready right to relief, prospectively, through the Commission for one aggrieved at any allegedly improper or incomplete filing. It showed also that reparation, if awarded, would not benefit consumers but would merely provide a windfall to the pipelines or distributors.

By denying the applicability of the filed rate doctrine to all rates which have been filed and accepted by the Commission, but which have not been made subject of a "just and reasonable" hearing before the Commission or of an order "approving, rejecting or in any way affecting such rates," the whole purpose of the Natural Gas Act is frustrated. This Court has repeatedly held that the primary aim of the Natural Gas Act was to protect the ultimate consumer from exploitation and excessive charges at the hands of natural gas companies. *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137 (1960), reh. denied, 364 U.S. 856; *Phillips Petroleum Co.* v. *State of Wisconsin*, 347 U.S. 672 (1954), reh. denied 348 U.S. 851; *FPC* v. *Interstate Natural Gas Co.*, 336 U.S. 577 (1949). How can that aim be achieved when the prices at which natural gas is purchased and sold are not known?

[7] Brief of *Amicus Curiae* Federal Power Commission, p. 2.

To illustrate the breadth of the problem, in the five-year period from 1957 to 1961, 4,725, or approximately 78 percent, of the rate increases of independent producers were permitted to go into effect without suspension by the Commission.[8] During that same period, 7,227 rate schedules for proposed new services were tendered to the Commission[9] by independent producers. How many of these were permitted to go into effect in the same manner as the Petitioner's rate schedules in the case at bar is not clearly reported, but it is reasonable to assume that the number is substantial. To further complicate the matter, since the Natural Gas Act applies to pipeline companies as well as to independent producers, no legal reason exists why the rationale of the decision below should not apply to arrangements between pipeline companies and their customers. In the five-year period from 1957 to 1961, nearly one-fifth of the rate increases filed by pipeline companies were permitted to become effective without suspension.[10] According to the court below, until such time as the Federal Power Commission takes formal action with respect to the gas purchase price, the legal rate may be determined to have been different—higher or lower—than shown in the documents accepted for

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[8] As shown in the Thirty-Seventh through the Forty-First Annual Reports of the Federal Power Commission for the fiscal years 1957-1961, 1,123 independent producer rate increases became effective without suspension in fiscal year 1957, 1,370 in fiscal year 1958, 951 in fiscal year 1959, 654 in fiscal year 1960 and 627 in fiscal year 1961. During this period the Commission disposed of 6,026 independent producer rate increases.

[9] Ibid. 1,183 were filed in fiscal year 1957, 1,200 in fiscal year 1958, 1,492 in fiscal year 1959, 1,659 in fiscal year 1960 and 1,693 in fiscal year 1961.

[10] Ibid. Of the 193 rate increases filed by pipeline companies during this period, 37 went into effect without suspension.

filing, and the order accepting same; such determination to be based upon the true, binding effective contractual arrangements, filed or unfiled.

2. The Filed and Finally Accepted Rate is the One and Only Rate Which May Be Charged and Collected for Sales of Natural Gas in Interstate Commerce.

It has hitherto been acknowledged as the *sine qua non* to rate-regulation that the filed rate is the only legal rate, and, as a corollary thereto, that in matters of rate regulation the jurisdiction of the agency charged with administering the regulatory act is primary. These doctrines constitute the very foundation of effective rate regulation and find support in a long consistent line of decisions under the Natural Gas Act, *Hope Natural Gas Co.* v. *Federal Power Commission*, 134 F. 2d 287 (4th Cir., 1943), rev'd on other grounds, 320 U.S. 591; *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.*, 162 F. 2d 888 (5th Cir., 1947), cert. denied 332 U.S. 770; *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 173 F. 2d 784 (6th Cir., 1949); as well as in decisions under rate regulatory statutes similar to the Natural Gas Act, *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951), *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), *United States* v. *Jones*, 336 U.S. 641 (1949); *United States* v. *Interstate Commerce Commission*, 337 U.S. 426 (1949); *Backus-Brooks Co.* v. *Northern Pacific Railway Co.*, 21 F. 2d 4 (8th Cir., 1927), cert. denied 275 U.S. 562; *Chicago, Indianapolis & Louisville Railway Co.* v. *International Milling Co.*, 43 F. 2d 93 (8th Cir., 1930); *Woodrich, et al.* v. *Northern Pacific Railway Co.*, 71 F. 2d 732 (8th Cir., 1934); *Watab Paper*

Co. v. *Northern Pacific Railway Co.*, 154 F. 2d 436 (8th Cir., 1946).

The indispensibility of these doctrines to effective regulation under the Natural Gas Act is further demonstrated by an examination of the provisions of that statute.

In Section 4 of the Act, the statute's multiple standard of just, reasonable and not unduly preferential or discriminatory rates (sub-sections (a) and (b))[11] is coupled with the requirement that all rates subject to the Commission's jurisdiction shall be filed under such rules and regulations as the Commission may prescribe and within such time and in such form as the Commission may designate (subsection (c)).[12] Nor shall the rate thus filed be changed, except after thirty days notice to the Commission and to the public unless otherwise ordered by the Commission (subsection (d)).[13]

Parenthetically it should be recalled that the rates of independent producers such as Petitioner and Movant, which sell natural gas for resale in interstate commerce, were declared subject to the Commission's jurisdiction on June 7, 1954 in *Phillips Petroleum Co.* v. *State of Wisconsin*, 347 U.S. 672 (1954). Pursuant thereto, the Commission by its series Nos. 174 Orders directed compliance by the producers with the dictates of the Natural Gas Act, and enjoined them by regulation from making any change in rates in effect on and after June 7, 1954 without first filing a change in

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[11] 15 U.S.C. § 717c.

[12] Ibid.

[13] Ibid.

rates pursuant to Section 4(d) of the Act. The present Commission Regulation specifically applicable to producers provides:[14]

> 154.94 Changes in Rate Schedules
>
> (a) No change shall be made in any rate, charge, or service in effect on and after June 7, 1954, for the interstate transportation or sale of natural gas in interstate commerce subject to the jurisdiction of the Commission by any independent producer required to file rate schedules pursuant to Section 154.92 hereof, without first filing a change in rates pursuant to Section 4(d) of the Natural Gas Act and in accordance with this section.
>
> (b) Every [such] change . . . shall be filed with the Commission . . . not less than 30 days nor more than 90 days prior to the date such change in rate schedule is proposed to be made effective.

This provision for the filing of any change in rate serves to give notice and opportunity to the Commission and to all interested parties to act before the change goes into effect. Thus the proposed new rate may be suspended within 30 days after it is filed, either on complaint or on the Commission's own motion, for five months, to permit a hearing at which the burden of proof is on the seller to show that the new rate meets the statutory standard (Section 4(e)).[15]

Apart from a change in rate, the Commission is empowered at all times to bring the rates of a natural-gas company subject to its jurisdiction into accordance with the statutory standard by fixing the just and reasonable rate to be thereafter observed upon finding, in a hearing had either upon its own motion or upon com-

[14] 18 C.F.R. § 154.94.

[15] 15 U.S.C. § 717c.

plaint, that the rates being charged are unjust, unreasonable, unduly discriminatory or preferential. (Section 5(a)).[16]

Turning to the other provisions of the Act, it is seen that these, too, are clearly keyed to the filed rate and are framed to make that rate conform to the statutory standard. For example, the Commission is authorized to ascertain the actual legitimate cost of property (Section 6);[17] to prescribe the accounts, records and memoranda to be filed by natural gas companies (Section 8),[18] to determine and fix proper and adequate rates of depreciation and amortization of the several classes of property of each natural gas company (Section 9);[19] to require special reports by natural gas companies (Section 10),[20] to conduct investigations (Section 14),[21] and to perform any and all acts, and to prescribe, issue, make, amend and rescind such orders, rules, and regulations as it may find necessary or appropirate to carry out the provisions of the Act (Section 16).[22] The constitutional rights of the parties are at all times protected by the statutory provision for judicial review (Section 19(b)).[23]

Continuing, the provision by Congress in Sections 20[24] and 21[25] of the Act of effective means of enforce-

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[16] 15 U.S.C. § 717d.
[17] 15 U.S.C. § 717e.
[18] 15 U.S.C. § 717g.
[19] 15 U.S.C. § 717h.
[20] 15 U.S.C. § 717i.
[21] 15 U.S.C. § 717m.
[22] 15 U.S.C. § 171o.
[23] 15 U.S.C. § 717r.
[24] 15 U.S.C. § 717s.
[25] 15 U.S.C. § 717t.

ment completes Congressional reliance on the filed rate procedure and on administrative action to enforce the statutory standard of just, reasonable and not unduly discriminatory or preferential rates. The Commission may resort to the courts to enjoin violations of and to enforce compliance with the Act and Commission rules, regulations or orders thereunder, and willful violations thereof are subject to punishment by both fine and imprisonment.

Finally, the intention of Congress to rely on the filed rate procedure and on Commission action to enforce the prescribed rate standard is confirmed by the *omission* from the Act of any provision for recovery of reparations or for preservation of any common law rights or remedies by any private party.[26]

Clearly, therefore, from the very structure of the Act, reinforced by the decision cited, it is apparent that the doctrine that the filed rate is the only legal rate is the very keystone of effective regulation thereunder, and that this doctrine necessarily embraces all rates, "whether fixed or merely accepted by the Commission."[27]

3. Exhaustion of Administrative Remedies Should Have Been Had Prior to Resort to the Courts.

Since the filed rate doctrine and the doctrine of the primacy of the Commission's jurisdiction in matters of rate regulation are correlative, the same authorities

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[26] It was for these reasons that the Commission stated in footnote 2 on page 9 of its brief in *Northwest Public Service Co.* v. *Montana Dakota Utilities Co.*, 181 F. 2d 19 (8th Cir., 1950) that the District Court's reference to the distinction between rates "merely filed" and rates "approved" by the Commission was not material.

[27] *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 251-252 (1951).

that support the former also support the latter. Congressional policy in this regard is also clearly evinced by the provision in Section 19(b) of the Act which restricts judicial review to those objections previously urged before the Commission on rehearing, unless reasonable grounds exist for the failure to do so. Additionally, whether filings in compliance with the Act are valid or invalid, complete or incomplete, are matters for the Commission to decide in the first instance. *Myers, et al.* v. *Bethlehem Shipbuilding Corp.*, 313 U.S. 41 (1938); *Macauley, Acting Chairman of the United States Maritime Commission* v. *Waterman Steamship Corp.*, 327 U.S. 540 (1946); *FPC, et al.* v. *Arkansas Power & Light Co.*, 330 U.S. 802 (1947). For decision of such questions are peculiarly necessary and appropriate to administration of the Act, and even if not impliedly authorized by Sections 4(d) and (e) of the Act, would be amply authorized by the general grant of power under Section 16 of the Act.

4. Conclusion.

If the holding of the lower court be the law, what function does Section 4 of the Act serve? Of what value are the Commission's powers to require reports of natural gas companies, to conduct investigations, to determine costs and depreciation, to fix rates of return and, in short, to regulate, if all can be abrogated by court construction of these "private agreements" which are tariffs or rate schedules filed and accepted by the Commission without condition or suspension? How are the effects of these arrangements on the producer, the pipeline company, and the distributing company to be accounted for, evaluated, and controlled? How is the ultimate consumer to be protected by the Federal Power Commission?

Movant submits that the foregoing is sufficient to demonstrate the error of the decision below and the threat posed thereby to effective regulation under the Natural Gas Act. The petition for the writ of certiorari should, therefore, be granted so that the decision of the Court of Appeals below may be reversed and vacated.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 823

PAN AMERICAN PETROLEUM CORPORATION, *Petitioner*,

v.

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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BRIEF OF RESPONDENT IN OPPOSITION

This proceeding derives from a common law action commenced in the United States District Court for the District of Nebraska, its jurisdiction having been based upon diversity of citizenship.

The action was brought by a buyer of natural gas (Respondent) against the seller (Petitioner) to recover $20,238.31 plus interest. This amount represented payments for gas at a rate in excess of that fixed by contracts between the parties. The overpayments

were made under protest under the compulsion of a state minimum price order which was subsequently held invalid and void *ab initio.*

The District Court, having tried the action on the pleadings and a stipulation of facts, gave judgment for the plaintiff (Respondent). (R. 78-98).

The United States Court of Appeals for the Eighth Circuit affirmed the judgment. 297 F. 2d 561 (1962).

There is no reason why the Supreme Court should issue a writ of certiorari to review that decision. On the contrary, the petition should be denied because:

(a) The decision of the Eighth Circuit is not in conflict with the decision of any other court of appeals on the same matter;

(b) No important question of federal law is involved;

(c) No federal question has been decided in a way in conflict with any applicable decision of this Court;

(d) There has been no departure from the accepted and usual course of judicial proceedings.

QUESTIONS PRESENTED

1. Does a state minimum price order which has been held to be a complete nullity *ab initio* nevertheless impose a price increase on the buyer above the price fixed by contract as a result of the Federal Power Commission's acceptance for filing of the void order, along with the contracts, for limited purposes?

2. Can a United States District Court, having jurisdiction by reason of diversity of citizenship, properly

decide in a common law action that a buyer of natural gas is entitled to recover amounts paid under protest in excess of the contract price under the compulsion of a totally invalid state minimum price order?

STATEMENT

During the period 1949-1952, Respondent and Petitioner entered into three contracts for the purchase of natural gas from the Kansas Hugoton Field for transmission and resale in interstate commerce by Respondent. (R. 19) One of the contracts, entered into in 1950 and stipulated by the parties as representative of the others (R. 28, 30), established a contract price (found to be in effect on June 7, 1954; R. 114) of 7.5¢ per MCF (thousand cubic feet) at a pressure base of 16.4 p.s.i.a. (pounds per square inch absolute). The contract also provided:

> "If the Kansas Corporation Commission, the Federal Power Commission, or any other governmental agency, whether State or Federal, *having competent jurisdiction*, at any time during the term of this contract fixes or determines a higher price for gas in the Kansas Hugoton Field than is set forth in this Section 1, (a), (b) and (c), the Buyer shall pay Seller the price thus fixed or determined, provided, however, that the price to be paid by Buyer to Seller shall at no time during the contract period hereof be less than the price set out. . . ." (Stip. Ex. H; R. 49) (Emphasis added.)

On December 2, 1953, the Kansas Corporation Commission purported to establish a minimum price of 11¢ per MCF at 14.65 p.s.i.a. for natural gas from the Hugoton Field. (R. 19) Respondent and Cities Service Gas Company promptly instituted proceedings in

a Kansas state court to review this order. (R. 19-20) Respondent, in order to minimize expenses and upon assurances that the test litigation would be continued, subsequently withdrew, without prejudice, from the proceedings. (R. 31)

On February 18, 1954, Respondent sent Petitioner a letter indicating its continued objection to the increased rate, stating in pertinent part:

> "During the period of appeal and pending final judicial determination of said Order, beginning January 1, 1954, Kansas-Nebraska Natural Gas Company, Inc. intends to pay for all gas purchased by it in the Kansas Hugoton Field in compliance with said Order. This compliance, however, is made to avoid any penalties or actions under the laws of Kansas for any violation, and all payments made to you in compliance with said Order, pending its final judicial determination will be paid to you under protest and as involuntary payments on our part, all without prejudice to our rights.
>
> "Should the said order be modified or declared invalid either in whole or in part, any and all overpayments made to you by virtue thereof shall be due and owing the Kansas-Nebraska Natural Gas Company, Inc. In event of any such overpayments, the amount shall be withheld from subsequent payments in the event you have not made full settlement of any overpayment." (Stip. Ex. B; R. 36; R. 3)

Checks subsequently tendered Petitioner by Respondent referred to this letter and were accepted by Petitioner. (R. 20)

By this Court's decision in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954), sales of natural gas by so-called "independent" producers such as Peti-

tioner for resale in interstate commerce were brought under the jurisdiction of the Federal Power Commission under the Natural Gas Act. As a result, the Commission on July 16, 1954, issued its Order No. 174 (18 CFR 154.91, *et seq.*), requiring all "independent" natural gas companies:

(1) to obtain from the Commission certificates of public convenience and necessity before engaging in any transportation or sale of natural gas;

(2) to file with the Commission schedules (defined in the order as "the basic contracts and all supplements amendatory thereof, effective and applicable on June 7, 1954") showing all rates and charges incident thereto; and

(3) to file with the Commission all subsequent rate changes.

The Petitioner accordingly submitted to the Commission the three contracts with Respondent, each accompanied by a copy of the Kansas Corporation Commission Order and a sample billing showing compliance with the order. (R. 26-30 and Stip. Ex. F, H and I; R. 44-50) These were accepted for filing by the Commission, which wrote Petitioner as follows:

> "This acceptance for filing shall not be construed as a waiver of the requirements of Section 7 of the Natural Gas Act, as amended; *nor shall it be construed as constituting approval of any rate, charge*, classification, or any rule, regulation or practice affecting such rate or service *contained in the rate filing . . . .*" (R. 27-30 and Stip. Ex. L; R. 54) (Emphasis added.)

Subsequently, on December 8, 1956, the Kansas Supreme Court sustained the 11¢ minimum price order in proceedings resulting from the review originally sought

by Respondent and Cities Service, as carried on by the latter. *Cities Service Gas Co.* v. *State Corporation Commission of Kansas*, 180 Kan. 454, 304 P. 2d 528. This Court reversed that decision, holding the 11¢ order invalid. *Cities Service Gas Co.* v. *State Corporation Commission of Kansas*, 355 U.S. 391 (1958). And, on April 11, 1959, the Kansas Supreme Court held that the effect of this Court's action was to render the 11¢ order void *ab initio*. *Cities Service Gas Co.* v. *State Corporation Commission of Kansas*, 184 Kan. 540, 337 P. 2d 640, *cert. den.* 361 U.S. 836 (1959).

By letters dated January 23, 1958 and February 18, 1958 (R. 34-35 and Stip. Ex. DD and EE; Supp. R. 9-12), Respondent notified the Petitioner of its intention to recover the contract overpayments made under compulsion of the invalid 11¢ order. Petitioner denied Respondent's right to recovery, whereupon Respondent instituted the action in the District Court.

SUMMARY OF ARGUMENT

As permitted by the Natural Gas Act, Respondent and Petitioner entered into contracts for the sale of natural gas for transmission and resale in interstate commerce. These contracts were filed with the Federal Power Commission and have been in full force and effect at all times. Compelled by the state minimum price order subsequently determined by this Court and the Supreme Court of Kansas to be invalid and void *ab initio*, and under protest, Respondent temporarily paid Petitioner for gas at rates in excess of the contract price. Respondent had to sue to recover the overpayments which amounted, in all, to a little over $20,000.

Petitioner's sole defense was that because the minimum price order was filed with the Federal Power Commission along with the contracts, as required by law, the minimum price order, though void *ab initio*, established a higher rate as the "only legal rate," and one which superseded the contract prices. This is argued notwithstanding the denial by the Federal Power Commission that its acceptance for filing of a tendered rate schedule had any such result.

Absent affirmative Commission action other than mere acceptance for filing, no price except the contract price is established between the parties under the Natural Gas Act, and neither this Court nor any other court has ever suggested a different result.

There is thus no basis under Rule 19 of this Court for the granting of a writ of certiorari.

ARGUMENT

1. No Question of Great Judicial Moment Is Presented By This Case Because, in Allowing Respondent to Recover Protested Overpayments Made Under Compulsion of the Invalid Kansas Minimum Price Order, the Eighth Circuit Merely Enforced the Contracts Filed With the Federal Power Commission According to Their Terms, Consistent With Principles Established By This Court and the Commission Under the Natural Gas Act

Order No. 174 of the Federal Power Commission required the filing of "the basic contract and all supplements or agreements amendatory thereof . . ." (R. 41). Petitioner complied by filing (a) the contracts between the parties, (b) the 11c minimum price order of the Kansas Corporation Commission later held null and void, and (c) a sample billing showing Respondent's compliance with the 11c order, all of which the Commission accepted for filing. However, the Commission by letter to Petitioner clearly indicated the

limited significance of such acceptance, including the caveat "nor shall [such acceptance] be construed as constituting approval for any rate [or] charge. . . ." For, as explained in 1955 by the Commission in *Cities Service Gas Company*, 14 F.P.C. 134, at 143:

> "Acceptance of a rate schedule for filing does not involve a determination by the Commission of a substantive nature, nor does it indicate approval of the level or form of the rates set forth, or of the conditions of service. Such acceptance is a procedural matter wherein the person or company involved is informed that the rate schedule filed satisfies the formal requirements of Sections 154.92(b) and 154.93 of the Commission's Regulations."

But Petitioner refuses to recognize such a limited significance in the Commission's acceptance for filing of a rate schedule. Petitioner's argument, in essence, is that its filing of the invalid minimum price order (in addition to the contracts) with the Federal Power Commission under the Natural Gas Act established the higher rate set by the order as the rate effective between the Respondent and itself, notwithstanding the fact that Respondent has never consented to a revision of the contract rates, absent the compulsion of a *valid* state minimum price order. But this Court has clearly held that the fact of filing under the Natural Gas Act does not in and of itself convert a rate into a federally-imposed or even federally-sanctioned rate. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corporation*, 350 U.S. 332 (1956); *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103 (1958); *cf. Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

In *Mobile*, a case arising under the Natural Gas Act, the Court of Appeals for the Third Circuit, one judge

dissenting, reversed a Federal Power Commission order denying a non-consenting buyer's petition to reject the seller's tender of a schedule establishing a unilateral rate, and not only directed the Commission to reject the schedule (although previously accepted for filing), insofar as it purported to increase the rate in question, but also held that the buyer was entitled to a return of the amounts paid in excess of the contract rate. This Court affirmed the decision of the Third Circuit, holding "that the Natural Gas Act does not give natural gas companies the right to change their rate contracts by their own unilateral action." 350 U.S. 332, 337. In so deciding, the Court stated:

> "In construing the [Natural Gas] Act, we should bear in mind that it evinces no purpose to abrogate private rate contracts as such. To the contrary, by requiring contracts to be filed with the Commission, the Act expressly recognizes that rates to particular customers may be set by individual contracts. In this respect, the Act is in marked contrast to the Interstate Commerce Act, which in effect precludes private rate agreements. . . ." 350 U.S. 332, 338.

Respondent submits that its position is quite analogous to that of the buyer in *Mobile* seeking to prevent the imposition of a unilateral rate and that the principles set forth in that decision control here. It seems obvious that the contract rates indicated in the contracts filed with the Commission as in effect on June 7, 1954, but for the state minimum rate order, remain as the only agreed price between the parties upon the invalidation of the order, and that the filing of the subsequently invalidated order along with the contracts between the parties in no way detracts from this result.

But Petitioner argues that the Eighth Circuit erred in failing to apply another decision of this Court, *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951). However, upon analysis it is readily seen that it is Petitioner which is in error.

In *Montana-Dakota*, the plaintiff brought suit in the District Court in an effort to enforce rights alleged to arise *under the Federal Power Act*, 49 Stat. 863 *et seq.*; 16 U.S.C. § 791a *et seq.* By contrast, the action here is at common law to enforce contract rights. In *Montana-Dakota*, the court had to determine what, under the Power Act, were "reasonable" rates during a past period. The action here requires no comparable determination. In *Montana-Dakota*, the lower court purported to determine what the legally effective "reasonable" rate under the Federal Power Act had been, and to award to the plaintiff retroactive benefits to which it had no contractual claim, and which the Federal Power Commission had no authority to confer. In this case, the contracts between the parties fix agreed rates, requiring no determination of reasonableness by the District Court.

When placed in proper context, the statements quoted by Petitioner from the majority and dissenting opinions in *Montana-Dakota* lose their applicability to this case, and the conflict and uncertainties claimed by Petitioner with respect to the decision of the Eighth Circuit are shown to be nonexistent.

The problem here presented reduces itself to one calling only for the application of elementary common law contract principles. Thus no question of great judicial moment is presented to warrant review by this Court.

2. No Question of General Applicability to Federal Power Commission Rate Regulation Under the Natural Gas Act Is Presented By This Case Because, as Recognized by the Commission and This Court, Future Problems Incident to State Minimum Price Laws Are Effectively Precluded By This Court's Action in Invalidating Such Laws

In *Pan American Petroleum Corporation* v. *Superior Court of the State of Delaware for New Castle County*, 366 U.S. 656 (1961), on facts quite similar to those present here, this Court stated:

> "Petitioners contend that to permit the state courts to entertain the suits brought by Cities Service will jeopardize the uniform system of regulation that Congress established through the Natural Gas Act. *Apart from other considerations that dispel such fears*, it should be remembered that the route to review by the Court is open to parties aggrieved by adverse state-court decisions of federal questions. . . ." 366 U.S. 656, 665. (Emphasis added.)

It is submitted that one of the "other considerations" noted by the Court in that case and equally present in this one might well be the fact that the issues formally raised by state minimum price orders in the natural gas area no longer present significant problems.

But for the imposition of the Kansas minimum price order the question of contract overpayments would not have been raised and the contractual relationship between the Respondent and Petitioner would have remained undisturbed. Since this Court, by its decisions in *Natural Gas Pipeline Co.* v. *Panoma Corporation*, 349 U.S. 44 (1955), and *Cities Service Gas Co.* v. *State Corporation Commission of Kansas*, 355 U.S. 391 (1958), has effectively precluded other attempts at

similar state legislative action, the problem presented by this case will not occur in the future.[1]

The Federal Power Commission has adopted this position. By an order dated February 7, 1962 (27 Fed. Reg. 1368, Feb. 14, 1962) the Commission terminated proposed rulemaking proceedings looking to the amendment of the Commission's general rules to provide for rejection of any tender for filing pursuant to Section 4 of the Natural Gas Act to the extent that such filing was based upon a state-prescribed or attributed minimum price. The order says:

> "We believe that at this late date a rulemaking proceeding would be a cumbersome and inappropriate means by which to exercise our jurisdiction over the matters involved herein. Such matters can more conveniently be decided when properly raised in individual proceedings before us. We recognize, moreover, that a buyer of natural gas who has paid seller on the basis of a state minimum price law has an adequate remedy in an appropriate court in the event that his contract entitles him to a refund as a result of the invalidity of the state minimum price laws [citing *Pan American Petroleum Corp. v. Superior Court of Delaware for New Castle County* 366 U.S. 656 (1961)]. Furthermore, with respect to future rate filings the question appears to be moot for to the best of our knowledge there are no longer any state minimum price laws in effect. We conclude therefore, that the above-entitled proceeding should be terminated."[2]

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[1] Petitioner's references to 12,000 rate schedules and 627 rate increases accepted for filing in fiscal year 1961 (Pet. p. 8, fn. 4) are, therefore, irrelevant and misleading.

[2] To prevent undue prejudice to the cause of any private litigant by reason of this statement, the Commission, on March 14, 1962 (27 Fed. Reg. 2657, Mar. 21, 1962), issued an order to clarify the

3. The Decision of the Eighth Circuit in the Proceeding Below Does Not Conflict With the Decisions of Other Circuits

The Tenth and Third Circuits have both considered the effect of filing an invalid state minimum price order with the Federal Power Commission under the Natural Gas Act and both courts have concluded, consistent with the decision of the Eighth Circuit in the proceeding below, that the fact of filing does not preclude recovery of any contract overpayments collected pursuant to the invalid order. *Cities Service Gas Company* v. *Federal Power Commission*, 255 F. 2d 860 (10 Cir. 1958), *cert. den. sub nom. Magnolia Petroleum Co.* v. *Cities Service Gas Co.*, 358 U.S. 837 (1958); *Natural Gas Pipeline Co.* v. *Federal Power Commission*, 253 F. 2d 3 (3 Cir. 1958), *cert. den. sub nom. Dorchester Corporation* v. *Natural Gas Pipeline Co.*, 357 U.S. 927 (1958).

It is true that the proceedings in both of those cases took the form of a review of Federal Power Commission action, the courts having ruled as a condition pre-

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sentence in that order, quoted above, recognizing the buyer's remedy against the seller. The amending order states in pertinent part:

> "That sentence was not intended to express or imply any view as to whether contract actions in appropriate state or federal courts might be subject to defenses other than defenses based on the Kansas minimum rate order itself. To avoid doubt on that score, we hereby amend the above quoted sentence to read as follows:
>
> "'We recognize, moreover, that a buyer of natural gas who has paid seller on the basis of a state minimum price law can invoke the jurisdiction of an appropriate court in the event that his contract provides for a refund if the state minimum price laws are held invalid.'" Citing *Pan American Petroleum Corp.* v. *Superior Court of Delaware for New Castle County*, 366 U.S. 656 (1961).

cedent to their jurisdiction that Commission acceptance of a rate for filing constituted final reviewable action. In the case below, of course, the proceeding by the Eighth Circuit was a review of a judgment on a common law contract claim originated in the United States District Court under its diversity jurisdiction. However, this presents no conflict between the circuits. Congress has authorized the Courts of Appeals to review certain actions of the Federal Power Commission, § 19 (b) of the Natural Gas Act, 52 Stat. 831 (1938), as amended, and this Court has expressly held that the state courts (and therefore the Federal District Courts exercising their diversity powers) may take jurisdiction "to hear and decide" claims for the recovery of natural gas contract overpayments so long as the claim is founded on common law theories of recovery. *Pan American Petroleum Corporation* v. *Superior Court of the State of Delaware for New Castle County*, 366 U.S. 656 (1961). Thus, there are alternate routes to relief in cases such as this one, controlled by the manner in which the aggrieved buyer casts his action.

Nor did the Courts of Appeals for the Tenth and Third Circuits purport to hold otherwise. In fact, both Courts in the above-cited decisions noted without any indication of disapproval that actions in the District Courts for recovery of contract overpayments were pending at the time of their decision.[3] Petitioner's claim of conflict here is clearly incorrect.

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[3] 253 F. 2d at p. 5, fn. 5; 255 F. 2d 860, 861. *Signal Oil and Gas Co.* v. *Federal Power Commission*, 238 F. 2d 771 (3 Cir. 1956), cited by Petitioner, does not bear on the problem at hand, the Third Circuit there having mentioned in passing only that the rate schedule filed as per agreement of the parties constituted the lawful rate. This is undisputed.

But Petitioner also purports to find a conflict "at least in reasoning" between the Eighth Circuit decision in the proceeding below and decisions of the District of Columbia and Fifth Circuits.[4] Passing the fact that this Court resolves conflicting *decisions* not conflicting *reasoning*, the cited cases are irrelevant to the decision of the Eighth Circuit. They involved the right of the Federal Power Commission under the Natural Gas Act to control rate increases. This case involves the recovery of contract overpayments made under the compulsion of an invalid state minimum rate order.

Petitioner refers to *Atlantic Refining Company* v. *Public Service Commission*, 360 U.S. 378 (1959) as "Another aspect of this conflict in reasoning. . . ." But the problems there considered are totally irrelevant to the present situation. There is here no disagreement between the parties or the courts that, absent the "conditioning" of a rate under a certificate of public convenience and necessity, the agreed contract price filed with the Commission becomes the established rate unless the Commission declares it unreasonable. The present question, rather, is the effect of filing *in addition to the contract* a state minimum price order subsequently determined to have been a nullity *ab initio*.

Finally, with regard to Petitioner's allegation that the Eighth Circuit "has erred by construing Commission orders to mean that the formal act of 'acceptance' under Sections 4(*e*) or 4(d) has no legal significance," the complete answer is that the Eighth Circuit made no such construction.

[4] *Episcopal Theological Seminary* v. *Federal Power Commission*, 269 F. 2d 228 (D.C. Cir. 1959), *cert. den. sub nom. Pan American Petroleum Corp.* v. *Federal Power Commission*, 361 U.S. 895 (1959); *Bel Oil Corp.* v. *Federal Power Commission*, 255 F. 2d 548 (5 Cir. 1958); *cert. den.* 358 U.S. 804 (1958).

CONCLUSION

As this case presents no constitutional issue, no question of great judicial moment and no conflict among the circuits, the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

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v.

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., *Respondent*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY TO "BRIEF OF RESPONDENT IN OPPOSITION"

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PETITIONER'S REPLY TO "BRIEF OF RESPONDENT IN OPPOSITION"

Respondent, by asserting that "there are alternate routes to relief" (Resp. Br., p. 14), underscores the basic question—how can a regulated rate rest upon "final reviewable action" of an agency having exclusive, primary jurisdiction, and at the same point in time also rest upon conflicting, collateral determinations in

state or Federal "diversity" actions? As did the Court below, Respondent advances novel propositions: (1) that the legal rate in a regulated transaction is not controlled by agency action but can be fixed *retroactively* and *prospectively* by collateral reading of unfiled "private agreements" at "common law"; and (2) that "alternate routes" exist to establish the effective rate—*either* by agency action on a tendered rate followed by statutory review in Courts of Appeals and this Court, *or* by subsequent collateral litigation in a District Court "exercising" "diversity powers." Such interpretations are the cause of the widespread uncertainty as to legal status of the thousands of rates "accepted for filing" under Section 4, and of the increasing efforts of buyers and sellers to litigate disputes over rates outside of the framework of the Natural Gas Act.[1]

1. Respondent professes to believe that the only importance of the question here is its application to the legal status of state minimum price orders. This patently is too narrow a view. The importance of the question lies in the fact that the Eighth Circuit decision makes the Federal Power Commission a mere filing cabinet for natural gas rates and leaves Section 4 of the Act without any field within which to operate effectively. The question is whether or not parties may evade Commission supervision of rate schedules through contracts not filed with the Commission, abrogating the rates on file.

The question is not particular; it is universal. It applies to every rate on file with the Commission under

[1] *E.g., Socony Mobil Oil Company, Inc.* v. *Brooklyn Union Gas Company; The Ohio Oil Company* v. *Brooklyn Union Gas Company; Brooklyn Union Gas Company* v. *Transcontinental Gas Pipe Line Corporation*, 299 F. 2d 692 (5th Cir. 1962).

Section 4. If such contracts may be made and enforced outside of the provisions and procedures of the Act, then every rate now on file with the Commission under Section 4 may have lurking behind it, unfiled and unknown to the public, contracts which could supersede the rate publicly on file with the Commission.

The question, therefore, is clear, and universal to every rate on file under Section 4. The presence of the question was noted in *Pan American Petroleum Corp. v. Superior Court of the State of Delaware*, 366 U.S. 656 (1961), but not there answered as that decision did not go beyond the jurisdiction question. This Court stated (366 U.S. at 664):

> "We are not called upon to decide the extent to which the Natural Gas Act reinforces or abrogates the private contract rights here in controversy."

This Court there recognized the existence of the question as to whether or not rate filings provide the exclusive basis for charges or may be altered by private, unfiled, agreements.

In *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951), this Court answered the same question as to the Federal Power Act, an identical statute. The question is here squarely before this Court; no better vehicle for its presentation is apt to be found. The question involves the interpretation of sections which are at the heart of an important Federal regulatory act. It is a question potentially present in every natural gas rate on file with the Commission. It calls insistently for an answer in order that the vast uncertainty as to the status of all of these rates, and all rates hereafter filed under Section 4, may be removed.

2. Contrary to Respondent's implications, the Commission, at least prior to the Eighth Circuit's construction, rigorously enforced the exact cents per Mcf made effective by Commission action as the only effective rate. The Commission interprets the "filed rate" doctrine as applicable:

> "The policy decision enunciated by the Commission in Order No. 230 to require collection of increased rates is clearly in accord with the filed rate doctrine as announced by the Supreme Court in the *Montana-Dakota* case. The Court there held that the company 'can claim no rate as a legal right which is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms.' And as the Fourth Circuit in an earlier opinion in *Hope Natural Gas Company* v. *FPC* clearly stated (134 F. 2d 287, 311):
>
> > 'When rates were filed with the Commission pursuant to Section 4 (e) of the Act they become the only lawful rates which the utility could charge or accept (citing cases).'
>
> "Furthermore, if independent producers were not required to collect increased rates made effective by motion, serious problems would confront not only pipeline purchasers of natural gas and, in turn, distribution company purchasers, but also the Commission itself in the administration of the Natural Gas Act." (footnote omitted).[2]

3. The Commission has always recognized the exact rate "accepted for filing" as controlling until changed to another figure by subsequent action under the Act—the reservation of "approval" meaning *only* that the Commission can later change the rate prospectively

[2] *Re Alfred C. Glassell, Jr., et al.*, 25 FPC 286, 287-288 (Feb. 25, 1961).

upon determining "justness and reasonableness." (See *Re Home Gas Company*, 2 FPC 402, 409 (1940); *City of Cleveland* v. *Hope Natural Gas Co.*, 3 FPC 150, 187 (1942); *Hope Natural Gas Co.* v. *Federal Power Commission*, 134 F. 2d 287, 311 (4th Cir. 1943), rev'd., other grounds, *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944)). This has meant that the "accepted" rate is the only legal rate while Commission action of "acceptance" remains existent and outstanding. Thus, as to the 12 cents rate discussed in *Re Cities Service Gas Company*, 14 FPC 134 (cited at Resp. Br., p. 8), the Third Circuit noted that as long as such Commission action remained operative, this rate "accepted" for filing was the "only legal rate" and no other "rate could have been charged . . ." *Signal Oil and Gas Co.* v. *Federal Power Commission*, 238 F. 2d 771, 773 (3rd Cir. 1956). Here, Respondent, with the Eighth Circuit's approval, seeks to nullify such "accepted" and effective rates through the guise of collateral common law action without recourse to the agency.

4. A key to Respondent's error lies in Respondent's references to *United Gas Pipe Line Co.* v. *Mobile Gas Service Corporation*, 350 U.S. 332 (1956), and to the holdings of the Tenth and Third Circuits (Resp. Br., pp. 8-9, 13-15). In *Mobile*, on timely review, this Court reversed Commission action, and *then* made reference to "restitution," citing *Baltimore & O. R. Co., et al.* v. *United States*, 279 U.S. 781 (1929), in which an order of the Interstate Commerce Commission was *first* set aside, and *thereafter* a right of "restitution" was recognized. (279 U.S. at 785). The Tenth and Third Circuits adhere to the same two-step procedure, holding that timely reversal of Commission action of accepting

a specific rate in cents-per-Mcf for filing *is* a condition precedent to any "recovery" of claimed "overpayments" even in collateral litigation (*Cf.* Resp. Br., pp. 13-14, and Petition, pp. 13-15). The holding of the Eighth Circuit is diametrically opposite regardless of the guises of "common law" and "contract price"—in the face of still outstanding Commission actions, a different rate is established and enforced retroactively and prospectively, even though Respondent *never* proceeded before the Commission or the Courts under Sections 19(a) and 19(b).

Respondent and others interpret the Eighth Circuit's opinion to mean that by casting an "action" in "contract," Commission action under Section 4 may be circumvented and an "alternative" method of establishing legal rates created. Petitioner, however, believes *Mobile* means that Commission action accepting a rate claimed to be in conflict with an existing contract may be set aside on *timely* review, and that the reference to "restitution" was not intended to open the doors of state and Federal District Courts to reach behind Commission orders which have not been so set aside on review under Section 19. See *Portsmouth Gas Co.* v. *Federal Power Commission*, 247 F. 2d 90 (D.C. Cir. 1957).[3] Re-

[3] All cases cited by Respondent reached the Courts in *timely* manner under Sections 19(a) and (b) for review of Commission action: *e.g.*, in this Court, *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103 (1958); *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378 (1959). (See also the rate dispute in *Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U.S. 263 (1960)); in the Tenth Circuit, *Cities Service Gas Company* v. *Federal Power Commission*, 255 F. 2d 860 (10th Cir. 1958); in the Third Circuit, *Natural Gas Pipe Line Co. of America* v. *Federal Power Commission*, 253 F. 2d 3 (3rd Cir. 1958).

spondent overlooks the dilemma of all sellers faced with "common law" judgments on the one hand, and statutory duties, under pain of civil and criminal sanctions, to adhere to the effective rate under the Act, on the other.

5. Respondent avoids reference to the exact nature of Commission action under Section 4: (a) Staff review and summary of the filing, expressing the exact rate in cents-per-Mcf (R. 53); (b) formal meeting of the Commission and voting upon that specific rate in cents-per-Mcf, whether to suspend, reject, or accept it for filing and permit that rate to be effective (R. 53); (c) public notice of acceptance and effectiveness of the rate by posting such action in the public files as required by the Act (R. 54); (d) issuance of letter orders giving notice of such action (R. 54); and (e) opportunity to seek timely review under Sections 19(a) and (b). All Federal courts in Section 19(b) proceedings have held that any person in disagreement with the exact rate so made effective must proceed in timely manner under Section 19(b) or be bound by such rate not only under the Act, but also in collateral litigation. (Petition, p. 14). Respondent and others, however, now read the Eighth Circuit's opinion and *Pan American Petroleum Corporation v. Superior Court of the State of Delaware*, 366 U.S. 656 (1961), as creating a loophole permitting either lower or higher rates to be enforced in collateral litigation to which the Commission is a stranger.

6. Respondent seeks to convey the impression that Commission orders in its Docket No. R-168 blessed such collateral control of rates (Resp. Br., p. 12). Docket No. R-168 was initiated on April 28, 1958, to consider, *inter alia*, the legal questions of changing retroactively

then effective Kansas rates such as the 11 cents and 11.055 cents involved here. (23 Fed. Reg. 2973, May 2, 1958). After briefing and oral argument, the Commission terminated the proceeding *without* changing the legal, effective status of these rates under the Act. (27 Fed. Reg. 1368, Feb. 14, 1962). The Commission recognized a buyer could bring an action "in an appropriate court," but further recognized the existence of Federal defenses in such suits "other than defenses" based on a state order. (27 Fed. Reg. 2657, Mar. 21, 1962). The Commission also noted with respect to "exercise" of its "jurisdiction over the matters involved," "[s]uch matters can more conveniently be decided when properly raised in individual proceedings before us." (27 Fed. Reg. 1368, Feb. 14, 1962). In such matters, as recently as January 29, 1960, the Commission recognized continued, valid effectiveness of such an 11 cents rate. *Re Western Natural Gas Company*, 23 FPC 235 (1960).

7. Respondent seeks to limit the impact of the constructions below to disputes involving state orders, but such is not possible. Under the Act, rates may be "agreed-upon" initially by "contract," but a specific rate in cents-per-Mcf does not become the legal, effective rate except after Commission action on the tender. There are pending hundreds of disputes as to what rate should become effective because of differing interpretations of contract provisions. (See, *e.g.*, *Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U.S. 263 (1960).) The Eighth Circuit and others are interpreting the *Mobile* and *Pan American* decisions to mean that Commission actions upon such rates can be ignored, and the rates established retroactively and

prospectively in collateral suits outside Commission jurisdiction and statutory procedures.[4]

Petitioner submits that once a rate has been made effective under the Act by Commission action, it is that Federal rate—not a "state order" or "contract price"—which *thereafter* must control, and that antecedent or underlying disputes arising from contracts cannot control *unless* that Federal rate is first set aside by timely review of Commission action, as in *Mobile*, *Texas Gas*, and other cases. The Eighth Circuit's construction, however, leaves Petitioner, and every regulated natural-gas company, subject to collateral, conflicting judgments in every instance in which a buyer, landowner, processing plant operator, or royalty owner claims a "contract right" to pay or be paid on the basis of some figure different from the specific rate accepted for filing and effective by Commission action.

Petitioner, in its day-to-day operations cannot, at one and the same time, comply with the Natural Gas Act and Commission orders thereunder, and also with these conflicting judgments in collateral litigation. This Court once said that the Commission's jurisdiction cannot "vary with the rise and fall of the Susquehanna River."[5] The question here is whether its rate jurisdiction can rise and fall with "alternate" routes, depending upon how an "aggrieved buyer" chooses to

[4] A recent startling example is *Superior Oil Company* v. *El Paso Natural Gas Company*, No. 1457, 83rd Judicial District Court, State of Texas, which was initiated even though the Commission had instituted a proceeding to resolve the same dispute. Cf. *The Pure Oil Company* v. *Federal Power Commission*, No. 13,392, 8th Cir., decided February 26, 1962.

[5] *Pennsylvania Water & P. Co.* v. *Federal Power Commission*, 343 U.S. 414, 420 (1952).

cast a "suit" to set aside an effective rate. Either Commission actions control, or natural-gas companies are free to make "private agreements" and then enforce "contract" claims outside the reach of the Act.

For the foregoing reasons and those set forth in the Petition, the Petition for Writ of Certiorari should be granted.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S OBJECTION TO MOTION OF WESTERN NATURAL GAS COMPANY FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION

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RESPONDENT'S OBJECTION TO MOTION OF WESTERN NATURAL GAS COMPANY FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION

In this objection Respondent, pursuant to Rule 42(3), states its reasons for having withheld consent to the filing of the proposed brief *amicus curiae.*

The Petition for Writ of Certiorari herein was filed on March 28, 1962. Respondent asked and was granted an extension of the time for filing its Brief in Opposition to May 14, 1962. Having promised Petitioner to file such brief at an earlier date if possible, Respondent actually filed it on May 10, 1962.

Movant first got in touch with Respondent about the filing of a brief *amicus curiae* on May 2, 1962—35 days after the filing of the petition. Movant asked Respond-

ent whether it would consent to such filing. In the ensuing discussion, Movant was expressly asked:

(i) Whether any new factual or legal matter relevant to the proceeding would be presented in the contemplated brief *amicus*. The answer was in the negative.

(ii) Whether Movant was dissatisfied with the presentation of the facts and authorities by Petitioner. Movant answered that it considered the presentation in the petition to be adequate.

Since nothing of a substantial nature was to be contributed by the proposed brief *amicus*, and the question appeared not to have been raised a reasonable time prior to consideration of the petition, Respondent withheld its consent.

The motion and proposed brief which Movant has filed confirm the correctness of Respondent's withholding of consent. Movant states no relevant facts which have not been adequately presented by the Petitioner. The motion does recite that "there are other factors present *in Movant's case* which bear on a correct determination of the issue and should be presented to the Court." (Mot. pp. 1-2). (Emphasis added.) But surely "factors" in a state court action to which neither Petitioner nor Respondent herein is a party are not "facts" of which Movant must show the "relevancy to the disposition of the case" within the meaning of Rule 42(3).

In addition to irrelevant "factors" from a different case, Movant offers only that the impact of the decision below "should be more fully explained for a proper understanding by the Court of the importance of the

case." (Mot. p. 2) This falls far short of the requirement of Rule 42(3) that a motion of this type shall "set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties. . . ." This is particularly clear in view of Movant's concession that "the petition herein clearly and correctly presents the basic issue involved. . . ." (Mot. p. 2)

In any event, Movant's effort more fully to explain the impact of the decision below, and to breathe "national significance" into a common-law action to recover excess payments under a contract, turns out to be no more than a restatement or, at most, a minor amplification of the position of the Petitioner herein. The motion (p. 5) and the petition (p. 8, fn. 4) both offer statistics on filings for rate increases which are here completely irrelevant. (Br. Resp. Opp. p. 12, fn. 1) Indeed, if the decision below threatens "all segments of the natural gas industry" with the utter chaos which is so terrifyingly vivid to Movant (Mot. p. 5), it seems odd, to say the least, that not one other company from any segment of the industry has sought to voice its alarm as an *amicus curiae*.

Movant's proposed brief would describe the decision below as based on a "new and novel concept." (p. 8) That it was not so based but, rather, that it routinely recognized "traditional common-law claims" clearly appears from this Court's decision in *Pan American Petroleum Corp.* v. *Superior Court of the State of Delaware for New Castle County*, 366 U.S. 656 (1961). Movant's motion and proposed brief significantly fail to mention that case.

Movant's proposed brief would also suggest that the result below was reached through "legal legerdemain."

(p. 8) Actually it is Movant which, along with Petitioner, resorts to attempted sleight of hand or, better, the occult, in urging on this Court that a legal nullity, an order void *ab initio*,[1] should be given legal effect, which would be a judicial determination that a ghost has substance.

As the Movant has failed to meet the tests prescribed in Rule 42(3) and since it obviously has nothing to contribute which is relevant to this proceeding, the motion for leave to file a brief *amicus curiae* should be denied.

Respectfully submitted,

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May, 1962

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[1] *Cities Service Gas Co.* v. *State Corporation Commission of Kansas*, 355 U.S. 391 (1958); *Cities Service Gas Co.* v. *State Corporation Commission of Kansas*, 184 Kan. 540, 337 P. 2d 640 (1959), *cert. den.* 361 U.S. 836 (1959).

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 823

PAN AMERICAN PETROLEUM CORPORATION, PETITIONER

v.

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION AS AMICUS CURIAE

The Solicitor General files this memorandum upon behalf of the Federal Power Commission, as *amicus curiae*, in response to the request of the Court that the government state its views in the above-entitled case on the question of whether there is a conflict with the Natural Gas Act. The Commission is of the opinion that on the particular facts of this case the decision of the court below does not conflict with the Natural Gas Act or impair the agency's role in the administration of that statute.

The facts which give rise to this controversy are novel and cannot be expected to recur. Briefly, they are as follows:

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Between 1949 and 1952, the parties—petitioner as seller and respondent as buyer—freely contracted for the sale of gas at specified prices ranging between 7¢ and 10¢ per Mcf. The contracts further provided that the price would be adjusted upward if any state or federal agency "having competent jurisdiction" should fix a higher rate.

Thereafter, on December 2, 1953, the Kansas Corporation Commission promulgated an order which purported to establish a minimum price of 11¢ per Mcf. In July, 1954, the Federal Power Commission implemented this Court's decision of June 7, 1954, in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, by issuing Order No. 174, 13 F.P.C. 1195, as amended by Orders Nos. 174–A and 174–B, 13 F.P.C. 1255 and 1576 (18 C.F.R. 154.92–154.103). This order required independent gas producers to file with the Commission rate schedules "setting forth the terms and conditions of service and all rates and charges * * * effective on June 7, 1954," together with "a statement showing actual billing for a recent month in sufficient detail to show how the billing amount is determined." "Rate Schedule" was defined as "the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954, * * * ."

Petitioner, Pan American, thereupon filed with the Commission copies of (1) its contracts with respondent; (2) the Kansas minimum price order, which, had it been valid, would have resulted in an increase in the contract rate; and (3) a recent billing statement

showing 11¢ as the rate being paid by respondent, Kansas-Nebraska.

Subsequently, in January 1958, this Court ruled, *per curiam*, that the minimum price order was invalid. *Cities Service Gas Co.* v. *Kansas Corporation Commission*, 355 U.S. 391. Upon remand, the Kansas Supreme Court concluded that the effect of this Court's decision was to hold the State's minimum price order void *ab initio*. *Id.*, 184 Kan. 540, 337 P. 2d 640, certiorari denied, 361 U.S. 836.[1]

The instant suit, grounded upon diversity jurisdiction, was filed by respondent in the United States District Court for the District of Nebraska and sought recovery of overpayments which Kansas-Nebraska had made to petitioner prior to this Court's determination that the State minimum price order was invalid. Both courts below have ruled that the lawful rate for the period in question is the contract rate filed with the Federal Power Commission without enhancement by reference to the void State order and that restitution may be decreed on ordinary contract principles for the amount representing the difference between the contract rate and the rate invalidly prescribed by the State authorities.

Viewing the case in the light of its particular facts, we believe that the decision below does not conflict

[1] In 1957 an increased rate of 11.055¢ per Mcf was filed and "accepted for filing" to cover a Kansas state severance tax. That tax was later declared invalid by the Kansas Supreme Court. *State* v. *Kirchner*, 182 Kan. 622, 322 P. 2d 759. Respondent did not seek reimbursement of this item in this case (Pet. App. 5a–6a).

with the regulatory authority of the Power Commission. It is important to emphasize what it does *not* involve. This is not a situation in which a collateral attack has been made upon a Commission determination that a rate meets the substantive standards of the Natural Gas Act. See Sections 4, 5(a) and 7 (15 U.S.C. 717c, 717d(a) and 717f). Nor is it a case where, after the Commission has accepted a rate filing, a party to the contract underlying the rate seeks to litigate in some other forum either the rate's justness and reasonableness or the construction of the contract—matters which we believe fall within the Commission's primary jurisdiction. See *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246.

Petitioner, we stress, is not contending that the condition in its contract providing for an increase in the event that a higher rate is fixed by a governmental agency "having competent jurisdiction" is satisfied by the Kansas minimum price order. In substance, it argues that, although the Kansas order was concededly beyond the State's jurisdiction and therefore 11¢ was not due by contract, nevertheless the very fact that the void order was filed with the Federal Power Commission makes it the binding rate until the Commission enters an order striking it down.

This, therefore, is a case in which the following distinct circumstances appear. There is an unambiguous contract on file with the Commission, its terms and

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[2] As to questions of contract interpretation not in fact involving administrative expertise, review of a Commission determination is, in effect, *de novo*. *Texas Gas Corp. v. Shell Oil Co.*, 363 U.S. 263, 270. But nothing in that opinion suggests that such questions may be initially litigated in any court.

meaning undisputed, providing for a fixed rate or such higher rate as might be fixed by any State or federal agency "having competent jurisdiction". (If there had been a dispute involving the technical meaning of the documents, the appropriate procedure, in our view, would have been to refer that question to the Commission. Cf. *United States* v. *Western Pac. R. Co.*, 352 U.S. 59.) Payments were made, under protest, at the higher 11¢ figure fixed by the Kansas Commission in a minimum price order. This order, the courts have definitively determined, was void *ab initio* because of the State's lack of jurisdiction.

On these facts, the consideration that, prior to the determination that the Kansas order was invalid, the Federal Power Commission "accepted" a rate schedule (R. 54) accompanied by documents which indicated that the pipeline was being billed at the 11¢ figure set by the Kansas Commission cannot, in our view, operate to breathe life into a law which courts of competent jurisdiction have held was stillborn. Cf. *Kerr-McGee Oil Industries Inc.* v. *Federal Power Commission*, 260 F. 2d 602 (C.A. 10). In other words, the Commission's acceptance of the rate filing must be deemed to have been at the rate provided in the contract filed by the parties, rather than at the higher rate directed by the Kansas Commission in an order which proved a nullity. On this premise, there would clearly seem to be a right to restitution. *United Gas Co.* v. *Mobile Gas Corp.*, 350 U.S. 332, 347.[3]

[3] We note that the *amicus curiae* brief of Western Natural Gas Company suggests (pp. 11-12) that a determination that the pipelines are entitled to restitution as a result of an action

We need not speculate as to what would have been the situation if the Federal Power Commission, on motion of Kansas-Nebraska, had adjudicated the validity of the Kansas order, if it had erroneously concluded that the order was valid, and if Kansas-Nebraska had thereafter failed to challenge that determination under the procedures provided by Section 19 of the Natural Gas Act (15 U.S.C. 717r). Whether or not in such circumstances the Commission's action would have been *res judicata* as to Kansas-Nebraska or would otherwise have estopped it from claiming its contract rights, it is clear that the Commission did not attempt to adjudicate the matter here. Moreover, the fact that the lower courts have acted in this instance without a prior determination by the Commission does no violence to the regulatory scheme since they have not decided any question of a kind which necessitates agency determination. The crucial ques-

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in contract might leave them with a windfall profit not passed on to their customers. We point out that in fact Commission orders in subsequent rate cases, involving all of the principal pipelines operating interstate from the Kansas gas fields, including Kansas-Nebraska, have included provisions requiring them to pass on to their customers refunds they receive as a result of the fact that the Kansas minimum rate orders have been held to be invalid. See *Colorado Interstate Gas Co.*, 20 FPC 874, 879, par. (E); *Cities Service Gas Co.*, 15 FPC 1448, 1457, par. (D); *Kansas-Nebraska Natural Gas Co., Inc.*, Docket No. G-12391, July 17, 1959, 25 FPC 448, 459, 508-509; *Panhandle Eastern Pipe Line Co.*, Opinion No. 344, 25 FPC 787, 805, par. (F); *Northern Natural Gas Co.*, 13 FPC 773, 777, Fng. (4).

tion in this litigation was determined when this Court held the Kansas minimum price order invalid. The courts are now equally empowered to determine whether that decision, by operation of law, gave rise to a right of restitution.

Respectfully submitted.

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OCTOBER TERM, 1961

PAN AMERICAN PETROLEUM CORPORATION, *Petitioner*

v.

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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MEMORANDUM OF WESTERN NATURAL GAS COMPANY AS AMICUS CURIAE IN REPLY TO MEMORANDUM FOR THE FEDERAL POWER COMMISSION AS AMICUS CURIAE

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OCTOBER TERM, 1961

No. 823

PAN AMERICAN PETROLEUM CORPORATION, *Petitioner*

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KANSAS-NEBRASKA NATURAL GAS COMPANY, INC.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

MEMORANDUM OF WESTERN NATURAL GAS COMPANY AS AMICUS CURIAE IN REPLY TO MEMORANDUM FOR THE FEDERAL POWER COMMISSION AS AMICUS CURIAE

On May 28, 1962, this Honorable Court entered an order in the above entitled cause granting the motion of Western Natural Gas Company for leave to file brief, as *amicus curiae*. On the same day, this Honorable Court requested the Solicitor General of the United States to file a memorandum on the question of

whether there is a conflict with the Natural Gas Act. In response thereto, the Solicitor General of the United States filed a memorandum for the Federal Power Commission as *amicus curiae* referring specifically to the brief *amicus* of Western. This memorandum is filed in response to the memorandum of the Solicitor General.

The Solicitor General would adhere to the principles of the filed rate doctrine as established in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, yet would suspend its application in this particular case.

Thus he agrees the lower court's doctrine, if applied otherwise than to the particular facts here, would conflict with the Act and impair the Commission's role in its administration.

The Solicitor General would permit application of the decision below only to the particular facts of this case, but we know of no way, and he suggests none, whereby the precedent thereby established may be so controlled.

The line of distinction the Solicitor General would draw between the cases wherein the doctrine of the lower court would violate *Montana-Dakota* and impair the Commission's role and those wherein it would not is indeed difficult to perceive. For example, he would hold *Montana-Dakota* not violated in the present case wherein a party to a contract underlying a rate schedule seeks to litigate in another forum the effect of acceptance for filing as part thereof a law by which, at the time, the contract was apparently modified, yet would hold *Montana-Dakota* violated where a party to

a contract so filed seeks to litigate *construction of the contract.* In either case we have merely a rate accepted for filing (as distinct from approved) and in either case the answer may determine the effective price at which the gas is to be sold or purchased. If application of the lower court's doctrine in the one case would violate the Act and impair the Commission's role in its administration, we cannot see how it would fail to have a similar effect in the other. And the facts in Western's case readily demonstrate that the decision below conflicts with the Act and impairs the Commission's role even if limited to the cases involving minimum price filings.

As pointed out in Western's *amicus* filing, (a) a complaint proceeding instituted by it before the Federal Power Commission early in 1958 seeking a declaratory order determining effect of such a filing remains undisposed of by the Commission, (b) following the filing of such complaint Western's purchaser brought suit against it in a Delaware court necessarily involving determination of the same question, (c) there remains undisposed of a suit brought against Western and its purchaser in Kansas by royalty owners seeking declaratory order determining such question and (d) during pendency of all such proceedings there was instituted and concluded by the Federal Power Commission an investigation of all of Western's rates under Section 5(a) of the Natural Gas Act.

Such Section 5(a) proceeding was brought by the Commission in carrying out its administration of the act. Of necessity such investigation involved consideration of the reasonableness of Western's revenues based upon its effective rates and in such proceeding the Commission's staff gave full recognition for such

purposes to the 11¢ rate as filed. The case was concluded by the Commission without disturbing such rate. How can it be said that the existence of authority in the courts to determine years later in collateral proceedings that Western's rate was other than as shown in the filings so used does not impair or affect the Commission's role in conducting such a Section 5(a) proceeding? And as the proceeding was conducted and concluded on the basis of a lawfully effective rate of 11¢, what is the effect on the rate so used and the disposition of the case made by the Commission if a court years later in collateral proceedings holds the Commission erred in using the rate as filed?

In Docket No. RI60-213 involving Western's application, in 1960, to place in effect an increased rate for its Hugoton Field gas, there became, and is, involved the question of whether the rate in effect prior to the rate increase filing was 11¢ or 8¢, since such determination measures the maximum refund liability in event the increased rate is determined to be excessive. In this matter the Commission has expressly declined to declare what was the effective rate at the time of the rate increase filing, stating the matter was subject to litigation in the courts. In assessing any refund liability may the Commission determine the rate level or must it await court determination thereof? If it makes such determination on basis of rates as filed and a court later, without review of Commission action, determines the rate other than as so used, is the refund liability changed? Can this Commission reopen the matter? Where the Commission has taken an action based on such a filing should a court be permitted to declare it wrong without appeal from the Commission's action?

The Solicitor General declares the lower court has not decided "any question of a kind which necessitates agency determination." Yet the lower court determined what the rate was, and we had heretofore understood that the primary purpose for the Commission's existence was to determine rates. Its administration of the Act required it to, and it did, consider and apply the filed rate in Western's 5(a) proceeding, and in the rate increase matter it was its duty to do so.

It is true that the Commission has (a) refused, for over five years, to set down for hearing or otherwise dispose of Western's complaint in Docket G-14958 involving Commission jurisdiction to determine the rate established by the disputed filing, (b) dismissed in 1962 without decision its R-168 proceeding instituted by it in 1958 for the specific purpose of determining the effect of such filings (see Brief of Respondent in Opposition p. 12) and (c) declined to say what rate was so established even in rate increase proceedings where the determination was required to assess refund liability. Yet its authority and duty in these areas remains and, we trust, will be here reaffirmed.

The Solicitor General says the courts are now "equally empowered" (with the Commission). Just what impairment of Commission jurisdiction does this imply? Is the Delaware court equally empowered with the Commission to decide Western's rate despite the pendency with the Commission since prior to start of the Delaware suit of a complaint proceeding seeking Commission determination of that question? Or should a proper order of proceedings require (as in *California, Petitioner* v. *Federal Power Commission* decided here April 30, 1962) disposal of the Commission proceeding before the court acts?

And if the Delaware court determines the rate on the lower court's doctrine is the Commission required to abide thereby (a) in the complaint proceeding or (b) in the rate increase proceeding in Docket RI60-213?

What effect on the Commission's determination of Western's rates would be given a determination thereof in the Kansas declaratory judgment action?

What problems of "unscrambling" are imposed on the Commission by a court decree in these cases retroactively changing the rate accepted for filing? True, where pipeline rate increase orders have so provided, there will be refunds (to the distributors) of the jurisdictional portion of any recoveries. But what of the non-refundable interest earnings of the pipelines on amounts collected from jurisdictional customers since 1958 when the pipelines ceased paying producers the 11¢ rate? And what of the amounts collected by such pipelines from non-jurisdictional customers due to increases based on the 11¢ cost? Can the Commission devise and administer a plan that will effectively and equitably unscramble the results so that the burden falls equitably on the parties involved? As the Act did not contemplate such reparations, should the Commission be burdened with handling them?

All this costly litigation and confusion would have been avoided by simple adherence to the rule in *Montana-Dakota* that a rate as filed remains the rate until changed in the manner provided by the Natural Gas Act.

We respectfully submit that this Honorable Court should grant the petitions for writ of certiorari herein and by its decision unequivocally reaffirm the filed rate doctrine under the Natural Gas Act and restore the

Federal Power Commission to its rightful jurisdiction over natural gas rates.

Respectfully submitted,

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Certificate of Service

I hereby certify that I have this day served the foregoing Memorandum of Western Natural Gas Company as Amicus Curiae in Reply to Memorandum for the Federal Power Commission as Amicus Curiae upon the following named parties of record in this proceeding, by delivering a copy thereof in person, or by mailing a copy thereof properly addressed, to each of the parties named, or, where indicated, to the attorney of record of a party named:

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OCTOBER TERM, 1961

PAN AMERICAN PETROLEUM CORPORATION, *Petitioner*,

v.

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., *Respondent*.

PETITIONER'S RESPONSE TO "MEMORANDUM FOR THE FEDERAL POWER COMMISSION AS AMICUS CURIAE"

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 823

PAN AMERICAN PETROLEUM CORPORATION, *Petitioner*,

v.

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., *Respondent*.

PETITIONER'S RESPONSE TO "MEMORANDUM FOR THE FEDERAL POWER COMMISSION AS AMICUS CURIAE"

"Confession and avoidance" describes the "Memorandum for the Federal Power Commission." This Court has been told, in effect, that there is a conflict with the Natural Gas Act, but such conflict can be ignored. This Court has not been apprised of the exact impact of the conflict, nor of pendency of dozens of *identical* cases, and many other proceedings, controlled by the constructions below.

To the question—"Is there a conflict with the Act?" (the ultimate question here)—the Memorandum re-

sponds only with no less than five repetitious qualifications, none of which applies, *e.g.*:

> "... on the particular facts of this case ..." (Memo., p. 1)
>
> "The facts which give rise to this controversy are novel and cannot be expected to recur." (Memo., p. 1)
>
> "Viewing the case in the light of its particular facts ..." (Memo., p. 3)

The opinion below bears no such caveats. When the Eighth Circuit held that there *must* be a hearing and finding of "reasonableness" under § 4(e) or § 5(a) *before* a rate on file has binding, legal effect, that Court did not stamp on its decision that this "principle" applies only to "particular" facts. When the Eighth Circuit held that objection to a rate does not have to be made when the rate is tendered to the Commission, but that the rate may be permitted to go into effect without objection and subsequently be altered as a result of a decision in a case to which parties to the rate filing were strangers,[1] it did not restrict application of this novel pronouncement to a "particular" case.

That Court spoke clearly, not equivocally; its constructions are wrong, whether applicable in a "particular" case, or to hundreds of rates as, in fact, they are.

I. This Court must have desired a complete appraisal of the impact of the holding below. The Memorandum does not apprise the Court of basic conflicts. Specifically, the Memorandum

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[1] *Cities Service Gas Company* v. *State Corporation Commission of Kansas, et al.*, 355 U.S. 391 (1958).

(a) fails to advise of pendency of no less than forty court cases in which this *same* allegedly "novel," "non-recurring" question is *now* in issue;[2]

(b) fails to apprise this Court of the existence of the *same* allegedly "novel," non-recurring issue as a result of approximately 400 proceedings recently before the Commission, involving State of Louisiana taxes and in which collateral litigation is now imminent;[3]

(c) fails to attempt to reconcile what is now said in the Memorandum with the Commission's conclusion, less than four months ago, that the *precise* questions here "can more conveniently be decided when properly raised in individual proceedings" before the Commission (see FPC Order of February 14, 1962, Docket No. R-168, 27 Fed. Reg. 1368);

(d) fails to note that the allegedly "novel," "non-recurring" question of whether there can be retroactive refunds under the Act is pending in at least 17 cases in the Courts of Appeals;[4]

(e) fails to note the actual pendency of the same question of Commission-Court jurisdiction in collateral litigation involving rates based on disputed contract favored-nations clauses;[5]

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[2] A list of cases is set forth in Appendix *A* hereto.

[3] Pertinent excerpts from the Commission's Order of March 5, 1962, in *Texaco, Inc.; et al.*, Docket Nos. G-15,546, *et al.* (and some 400 other dockets), are reproduced in Appendix *B* hereto.

[4] A list of cases in which such question is in issue is set forth in Appendix *C* hereto.

[5] *E.g.*, *The Superior Oil Company* v. *El Paso Natural Gas Company*, now pending as Case No. 5592 in the Court of Civil Appeals for the Eighth Supreme District of Texas, El Paso, Texas.

(f) fails to note that the Kansas Corporation Commission construes the opinion below as in conflict with the Act and desires clarification by this Court;[6]

(g) fails to note that the Department of the Interior continues to demand royalty payments on Government lands in the Kansas Hugoton Field on the basis of the 11 cents price;[7]

(h) fails to apprise the Court, in connection with footnote 3 of the Memorandum, that so-called "refunds," if any, would end in the hands of distribution companies, not ultimate consumers;[8]

(i) fails to attempt to reconcile diametrically opposite positions taken by the Commission before this Court in the *Montana-Dakota* case, on the analogous question of collateral "invalidation" of a rate allegedly filed through *fraud*;[9]

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[6] The Kansas Commission's letter to this effect, dated June 1, 1962, to the General Counsel of the Federal Power Commission is reprinted as Appendix *D* hereto.

[7] Reproduced in Appendix *E*, as an example, is a demand from the Department of the Interior for such payments.

[8] See, *e.g.*, statement of Kansas law in "Petition for Writ of Certiorari to the Supreme Court of Kansas," *State Corporation Commission of Kansas, et al.* v. *Cities Service Gas Company*, No. 302, October Term, 1959, pp. 12-13. As to Missouri law, distribution companies are resisting refund orders, and the question is pending in *State ex rel. Laclede Gas Co.* v. *Public Service Commission of Missouri*, No. 16,389, Circuit Court for Cole County, Jefferson City, Missouri.

[9] See *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951). Reproduced in Appendix *F* hereto are excerpts from the Briefs of the Federal Power Commission as *amicus curiae* in the *Montana-Dakota* case before the Eighth Circuit and before this Court.

VI. The Memorandum rests upon a premise that the *exact* cents per Mef effective as *the* legal rate under the Act can change by "operation" of fact *or* law to another figure *without* action upon the rate by the Commission under § 4 or § 5—a premise rejected by Courts of Appeals, other than the Eighth Circuit. The Memorandum is silent as to the construction by the Tenth and Third Circuits with which the Memorandum itself is in conflict. (See Petition for Writ, pp. 13-17.) The statements in the Memorandum also conflict with the specific prohibition upon *any* changes set forth in the Commission's letter orders "accepting" a rate for filing (*e.g.*, R. 106):

> "In the event that *any of the documents* comprising the listed rate schedules contain provisions for future *automatic* adjustments in rate and charges based upon new or increased taxes, prices paid for gas by or to others, price re-determination provisions, *or any similar provision*, your attention is directed to the fact that such provisions, *when invoked to change the rates being charged June 7, 1954, will constitute a change in such rates and charges within the meaning of Section 4(d) of the Natural Gas Act and Section 154.94 of the Commission's Regulations* under such Act as promulgated by this Commission's Order No. 174-B." (Emphasis supplied)

The Memorandum fails to refer to this specific provision of the Regulations which prohibits *any* change of the effective rate in cents-per-Mef *except* by filing a change of rate at the Commission (Section 154.94(*e*), R. 41-42):

> "The *operation* of *any provision* of the rate schedule providing *for future* or periodic *changes* in *the rate*, charge, classification, or service *after June 7, 1954*, or the effective date of any rate schedule for

initial service after June 7, 1954 *shall constitute a change in rate schedule.*" (Emphasis supplied)

Despite such prohibitions, the Eighth Circuit held that the effective rate level in cents per Mcf may be changed collaterally, without recourse to the Commission. The Memorandum does not even attempt to reconcile this conflict with the applicable Commission Regulations under the Act, but either the Eighth Circuit must be reversed, or the quoted provisions of Commission orders and Regulations are inoperative and "must be deemed" rescinded.

VII. The Eighth Circuit has held that until a "just and reasonable" rate is fixed by the Commission—done as to a negligible number of producer rates—the contract price, as construed in collateral court litigation, controls. *If* such be the law, Petitioner and all other sellers are now entitled to recover, in collateral litigation, *all* contract prices higher than rates in effect by "acceptance" for filing under the Act, retroactive to June 7, 1954. *If* such be the law, then such contract prices also prevail over rates merely "conditioned" under Section 7, and there can be no "retroactive" refunds of the difference between contract prices and such "conditioned" rates. *If* such be the law, the Eighth Circuit also has opened the door for countless new rounds of collateral litigation, not only involving Kansas and Oklahoma pricing orders, but also disputed contract clauses and the severance and gathering taxes of the States of Kansas, Louisiana and Texas.

The Memorandum also fails to note that *if* the Eighth Circuit is correct, the Commission's much-publicized "Statement of Policy"; any rates based upon settlements such as those of Western Natural Gas Company,

amicus curiae here; and regulation through public announcements of the specific rate levels which will be "accepted for filing"; are all meaningless. *If* a rate so "accepted" for filing does not control, then "contract" prices higher than such rate may be enforced in collateral litigation, as long as the Commission has made no determination of "lawfulness" of a rate as "just and reasonable," which it does not even do in accepting settlements of rate cases. (*Cf.* Memorandum here and "Brief for the Federal Power Commission in Opposition," *State of Wisconsin, et al.* v. *Federal Power Commission*, No. 754, *et al.*, October Term, 1961, pp. 6, 9, 11, 16, 19.)

This Court should fully consider these questions, reconcile the conflict among the Tenth, Third and Eighth Circuits, and make clear the limits of the Commission's primary jurisdiction and of the courts in collateral litigation.

VIII. The Memorandum attempts to distinguish the questions here from situations in which issues involving federal statutes and agency orders have been held *not* to be within the jurisdiction of the courts *de novo* (Memo., p. 4). The Memorandum states that the "dispute" here did not involve "technical meaning" of documents, but, in fact, the opinions below are replete with attempts to interpret technical meaning of Commission documents. Specifically, the technical meaning of the Commission's letter orders is very much in issue in this and the more than forty pending cases; the technical meaning of the term "acceptance for filing" is very much in issue in these cases; and the technical meaning of actions of the Commission under Section 4 is at the heart of the issue in these cases. The opinions below, to say nothing of "headnotes" such as now ap-

pear at 297 F. 2d 561, thus refute any contention that there is involved only "construction" of an "unambiguous" contract. The Memorandum's purported distinction between this case and such cases as *United States* v. *Western Pacific Railway Co.*, 352 U.S. 59 (1956), thus simply does not stand up.

There is *no* attempt here to "breathe life" into a "state" law, as the Memorandum suggests. The Memorandum avoids the basic question of whether all rates now in effect *after* such Commission action rest upon exclusive, controlling Federal law, or instead still rest upon underlying contract law, subject to change by interpretation of contracts, and Commission actions, in collateral court actions. The question *is* whether there is "life" at all under the Federal statute for a Federal rate *after* the Federal Power Commission acts, as here, in formal meeting reflected by its minutes, and issues a letter order "accepting" a specific rate for filing as "in effect" under § 4 of the Act. If there is not, regulated industry needs to be told in clear terms, without the "yes, but" vagueness of the Memorandum.

This Court in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), indicated that a condition precedent to a "right of restitution" *is* statutory review of Commission action under § 19, setting aside Commission action under § 4. However, the Memorandum now seems to say that the courts are to be free to treat such actions of the Commission as "void" in collateral proceedings as well. *Cf. City of Takoma* v. *Taxpayers of Takoma*, 357 U.S. 320, 336-337 (1958); *United States* v. *Morgan*, 307 U.S. 183, 195-198 (1939); *Atlantic Coast Line R. Co.* v. *State of Florida*, 295 U.S. 301 (1935).

IX. The Memorandum apparently seeks to imply that any "refunds" involved here would pass back to ultimate consumers (Memo., fn. 3). The statement of the Kansas Commission reproduced in Appendix D shows that such would not be the case in Kansas, and that so-called "refund" provisions in Federal Power Commission orders result only in "windfall" profits to pipeline and distributing companies in this situation. The Petition for Writ of Certiorari in *State Corporation Commission of Kansas, et al.* v. *Cities Service Gas Company*, No. 302, October Term, 1959, apprised this Court of the situation, which the Memorandum here does not. The Kansas Commission then made clear that if such "refunds" ever occurred, *after* compliance with all statutes, approximately 80 percent of funds involved would be "windfalls" to pipeline companies, and only 20 percent would ever reach distribution companies. As to this 20 percent, the Kansas Commission stated (Petition, pp. 12-13):

> "'. . . we believe we have no jurisdiction to compel refunds to consumers by distributing companies and any refunds by Cities Service Gas to Kansas distributors will simply be a windfall to the distributing companies without any benefit whatever to the consumer. We think it likely the other state regulatory bodies may be similarly circumstanced.'"

See also *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951), where this Court noted the reason for such "windfalls" as stated by the Federal Power Commission—that if a distributing company so "*recoups again what it has already recouped from the public*, there is *no* machinery in or out of court by which others who have paid unreasonable charges to it can recover." (341 U.S. at 254, emphasis

supplied.) The Commission itself has been so advised that such is the situation here.

X. The Memorandum here ends with the cryptic, unexplained statement that courts of general jurisdiction are now "equally empowered" to determine meaning of Commission actions, what have been effective rates under the Federal Act in the past, whether there is a right of "restitution," and what are to be "deemed" legal rates now (which involve fixing the current and future rates). This statement—particularly the words "equally empowered"—adds further confusion for the regulated natural gas industry. Do the words "equally empowered" mean that the Federal Power Commission is now embracing the holding below and is willing to share its jurisdiction with courts of general jurisdiction? Such statement leaves this Court without an answer to the question posed; it also leaves unanswered the basic question as to the proper procedures under the Natural Gas Act for contesting a rate filing, now and in the future. Such a statement is clearly "in conflict with the Natural Gas Act," as is the decision below, unless the words "primary" and "exclusive," somehow, in "particular" cases, can mean "concurrent." (*Cf.* Section 19(b) of the Act.)

This Court has clearly indicated that where there is a conflict in interpretation of the provisions of the Natural Gas Act, "the route to review by this Court is open." *Pan American Petroleum Corporation* v. *Superior Court*, 366 U.S. 656, 665 (1960). The Tenth and Third Circuits adhere to the exclusive review procedure of § 19(b); the Eighth Circuit holds otherwise. The question presented is fundamental to control of all rates filed under the Act and to certainty and stability in a regulated industry. The opinion below clearly is

in conflict with the Act and should not be left unreviewed by this Court.

For the foregoing reasons and those stated in the Petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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June 12, 1962

APPENDIX A

A Partial Listing of Cases Pending in State and Federal Courts Involving the Same Issue Pending Before the Supreme Court in No. 823, October Term, 1961

COLORADO (State District Court in and for the City and County of Denver):

Colorado Interstate Gas Co. v. Pan American Petroleum Corp.

DELAWARE (Suits in Superior Court):

Colorado Interstate Gas Co. v. Helmerich & Payne, Inc. (three suits)

Cities Service Gas Co. v. Western Natural Gas Co.

Cities Service Gas Co. v. Pan American Petroleum Corp.

Colorado Interstate Gas Co. v. White Eagle Oil Co.

Northern Natural Gas Co. v. Hugoton Plains Gas and Oil Co.

DELAWARE (Suits in United States District Court):

Northern Natural Gas Co. v. Helmerich & Payne, Inc.

Northern Natural Gas Co. v. Hugoton Plains Gas & Oil Co.

Cities Service Gas Co. v. Pan American Petroleum Corporation

KANSAS (Suits in United States District Court):

Northern Natural Gas Co. v. Alf M. Landon

Northern Natural Gas Co. v. Margaret Landon Mills

Panhandle Eastern Pipe Line Company v. Charles Brecheisen

Cities Service Gas Company v. E. S. Villines and E. W. Campbell

KANSAS (Suits in State District Courts):

Northern Natural Gas Company v. Earl W. Campbell (Kearny County)

The Stevens County Oil & Gas Co. et al. v. Panhandle Eastern Pipe Line Co. (Stevens County)

Kansas-Nebraska Natural Gas Co. v. H. M. Gillespie et al. (Sedgwick County)

Fred Shore & Hazel Shore v. Western Natural Gas Co. and Cities Service Gas Co. (Seward County)

G. L. Hayward and Inez Hayward v. Island Gas, Inc., Walter Kuhn and Panhandle Eastern Pipe Line Co. (Morton County)

Cities Service Gas Company v. E. S. Villines and E. W. Campbell (Kearny County)

Colorado Interstate Gas Company v. Fred P. Fulton and Esther Fulton (Kearny County)

Northern Natural Gas Company v. Catherine Van Doren (Kearny County)

Kansas-Nebraska Natural Gas Co. v. Ben F. Brack (Sedgwick County)

Kansas-Nebraska Natural Gas Co. v. Albert A. Thornburgh and Virginia Thornburgh (Kearny County)

Kansas-Nebraska Natural Gas Co. v. Mary E. Thornburgh (Kearny County)

Kansas-Nebraska Natural Gas Co. v. L. R. Roderick and Florence Roderick (Kearny County)

Kansas-Nebraska Natural Gas Co. v. Barbara J. Beymer and Clyde E. Beymer, Jr. (Kearny County)

Kansas-Nebraska Natural Gas Co. v. E. W. Campbell and P. G. Campbell (Kearny County)

Kansas-Nebraska Natural Gas Co. v. B. C. McCue and Della McCue (Kearny County)

Kansas-Nebraska Natural Gas Co. v. Catherine Van Doren and H. N. Van Doren (Kearny County)

Kansas-Nebraska Natural Gas Co. v. Gladys E. Campbell (Kearny County)

Kansas-Nebraska Natural Gas Co. v. John S. Campbell (Kearny County)

J. E. Heintz and Margaret E. Heintz v. Cities Service Oil Company and Northern Natural Gas Co. (Morton County)

NEBRASKA (Suits in State Court):

Northern Natural Gas Co. v. Pan American Petroleum Corp. (Lancaster County)

Kansas-Nebraska Natural Gas Co. v. White Eagle Oil Co. (Lancaster County)

NEBRASKA (Suits in United States District Court):

Northern Natural Gas Co. v. Magnolia Petroleum Corp. (Lincoln)

Northern Natural Gas Co. v. Saturn Oil & Gas Corp. (Lincoln)

OKLAHOMA (United States District Court):

Panhandle Eastern Pipe Line Co. v. C. W. Barbour, et al. (Western District)

Northern Natural Gas Co. v. William Broadhurst (Northern District)

Northern Natural Gas Co. v. Anne Parker (Western District)

Cities Service Gas Co. v. J. M. Huber Corp. (Northern District)

Cities Service Gas Co. v. Forrest H. Lindsay, et al. (Northern District)

Cities Service Gas Co. v. M. F. Powers (Northern District)

OKLAHOMA (State District Court, Tulsa):

Colorado Interstate Gas Co. v. William Broadhurst
Colorado Interstate Gas Co. v. Helmerich
Cities Service Gas Co. v. M. F. Powers

TEXAS (Suit in United States District Court):

Cities Service Gas Co. v. W. E. Bakke (Western District, San Antonio Division)

APPENDIX B

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Joseph C. Swidler, Chairman; Howard Morgan, L. J. O'Connor, Jr., and Charles R. Ross.

TEXACO INC., ET AL., Docket Nos. G-15546, *et al.*

Order Requiring Refunds in Certain Proceedings and Terminating All Proceedings

(Issued March 5, 1962)

Respondents in the above-entitled proceedings have heretofore filed proposed increased rates solely reflecting reimbursement for the additional gas gathering tax of one cent per Mcf imposed upon said respondents, effective August 1, 1958 by the State of Louisiana pursuant to Section 678 of Title 47 of the Louisiana Revised Statutes. Respondents' proposed rates were suspended for one day and thereafter permitted to go into effect subject to refund of the increase in the event the tax was subsequently invalidated. On November 17, 1958, the Louisiana legislature suspended the operation of the gathering tax, effective December 1, 1958, and early in 1960 the Louisiana Supreme

Court held the tax unconstitutional. *Bel Oil Corp., et al. v. Rufus W. Fontenot, Collector*, 238 La. 1002, 117 S. 2d 571; *Southern Natural Gas Co. v. Robert Q. Roland, Collector of Revenue*, 240 La. 471, 123 S. 2d 891. [footnotes omitted]

* * *

Texas Eastern, Tennessee, United Fuel, and Southern — all of which filed petitions to intervene during the month of November, 1961 — are direct purchasers of respondents, and as such were routinely served with copies of the May 29 order. They, too, had ample opportunity to seek intervention and or rehearing but neglected to do so. It might be added, moreover, that each of the above pipelines was served with a copy of the April 14, 1961 order, granting rehearing to certain of the respondents. Such notice was sufficient to alert the purchasers that the Commission was contemplating modification of its February 21 order and that the refund seemingly promised them by said order was in jeopardy. Although failure of the November petitioners to seek intervention and or rehearing prior to May 29 did not bar them from doing so promptly thereafter, their protracted lack of diligence both before and after the controverted order prevents us from extending them grace at this late date.

In light of the preceding considerations, we shall vacate the August 30 order insofar as it permitted intervention by Southern and the Distributors and insofar as it reopened proceedings other than those designated in Appendices C, D, or E hereto. Additionally, we shall reject as untimely the petitions for intervention filed in November, 1961, by Texas Eastern, Tennessee, Southern and United Fuel. In taking this action, however, we do not intend and should not be construed to foreclose any party from seeking whatever relief, if any, may be appropriate under state law. Cf. *Pan American Petroleum Corp. v. Superior Court*, 366 U.S. 656 (1961).

APPENDIX C

Cases Now Pending in Which the Question of What is the Effective Filed Rate and the Question of Retroactive Refunding Under the Natural Gas Act Are in Issue

United States Court of Appeals for the Tenth Circuit:

Sun Oil Company v. FPC, No. 7018
Phillips Petroleum Company v. FPC, Nos. 7024, 7025, 7026

United States Court of Appeals for the Third Circuit:

Shell Oil Company v. FPC, No. 14031
Public Service Commission of New York v. FPC, No. 14051

United States Court of Appeals for the District of Columbia Circuit:

Sun Oil Company v. FPC, No. 17005
Socony-Mobil Oil Company, Inc. v. FPC, Nos. 17010 and 17011
Mississippi River Fuel Corporation v. FPC, No. 17013
Continental Oil Company, et al. v. FPC, No. 17009

United States Court of Appeals for the Fifth Circuit:

Callery Properties, Inc. v. FPC, No. 19563
Placid Oil Company v. FPC, No. 19622
Continental Oil Company and Newmont Oil Company v. FPC, No. 19651
W. H. Hunt, Trustee for Hassie Hunt Trust and Caroline Hunt Sands and Loyd B. Sands v. FPC, No. 19653
Union Oil Company of California v. FPC, No. 19654
Humble Oil & Refining Company v. FPC, No. 19657
Southern Natural Gas Company and Phillips Petroleum Company v. FPC, No. 19661
Austral Oil Company, Inc. v. FPC, No. 19662

United States Court of Appeals for the Ninth Circuit:

Tidewater Oil Co. v. FPC, No. 17909

APPENDIX D

TRUE COPY

STATE OF KANSAS
John Anderson, Jr., Governor

[Seal]

STATE CORPORATION COMMISSION
Topeka

June 1, 1962

Richard A. Solomon, General Counsel
Federal Power Commission
Washington, D. C.

Re: U. S. Supreme Court Case #823

Pan American Petroleum Corporation

v.

Kansas-Nebraska Natural Gas Company

Dear Mr. Solomon:

The Kansas Commission was this date informed that the Supreme Court requested of the Solicitor General a memorandum regarding the effect of the Eighth Circuit Court's opinion in the above referred to case upon the administration of the Natural Gas Act. Although the Kansas Commission is not directly involved in this proceeding, we are concerned about the consequences of the Eighth Circuit Court's decision. As we interpret the Court's opinion they repudiate the "filed rate doctrine" as set forth in the Northwestern Public Service Company v. Montana-Dakota Utilities Co. case previously decided by the Eighth Circuit. In the last mentioned case, Mr. Howard E. Wahrenbrock, Assistant General Counsel for the Federal Power Commission, filed a brief on behalf of the Federal Power Commission which we think clearly sets forth why the filed rate doctrine should be sustained and perpetuated. In our opinion, the redetermination of a rate, either higher or lower, in collateral litigation without an appeal from the Federal Power Commission's order

accepting the rate, could only lead to confusion and uncertainty to the detriment of all parties.

Without specific powers to order reparations which we feel are absent in the Natural Gas Act, the benefits of any price redetermination ensue only to the contracting party. This fact was made clear to the Kansas Commission in a recent proceeding involving the Kansas-Nebraska Natural Gas Company. Our Commission, in Docket 65,687-U, ordered Kansas-Nebraska to refund $422,000 which they have as of this date recovered from producers and land-owners as a result of the invalidation of Kansas .11-cent minimum price order. As of this date the Commission has been unsuccessful in getting Kansas-Nebraska to make a refund. A copy of their Petition for Rehearing is enclosed and you will note that in the first paragraph of their Petition, they contend that our Commission has no statutory authority or jurisdiction to order the refund.

Because of our concern for the perpetuation of the filed rate doctrine, we felt compelled to express our opinion prior to the filing of the Solicitor General's memorandum with the Supreme Court. In addition to the Petition for Rehearing in the Kansas Nebraska docket, we enclose for your consideration a copy of the Brief filed by FPC in the previously mentioned Northwestern Public Service Company v. Montana-Dakota Utilities Co. case.

Yours very truly,

/s/ Richard C. Byrd
Richard C. Byrd, Chairman

RCB:tk

Enclosures

cc: Joseph C. Swidler, Chairman
Federal Power Commission
Washington, D. C.

Address All Communications to the
State Corporation Commission

to (*supra*, pp. 9-16), holding the filed rates to be the legal rates, are therefore equally clear authority, contrary to the holding below, that an incomplete filing does not invalidate the filed rate. For the same basic reason the filed rate, even where improperly filed, has nevertheless been held to be the legal rate." (p. 37)

• • •

"Unlike lateness and incompleteness of filing, the question of fraud has not been passed on by the Commission. But that, too, is a matter subject to the primary jurisdiction of the Commission." (p. 39)